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IN THE

Supreme Court of the United States

October Term, 1964
No. .....

FRANK M. JORDAN, as Secretary of State of the State of California, EDMUND G. BROWN, as Governor of the State of California, THOMAS C. LYNCH, as Attorney General of the State of California, and THE SENATE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA,

Appellants,

vs.

PHILL SILVER,

Appellee.

STATEMENT AS TO JURISDICTION.

Opinion.

The opinion of the court below is not reported. It is printed in Appendix "A" *infra*. Printed in Appendix "B" is an earlier opinion in the same case.

Jurisdiction.

1. The ground upon which jurisdiction of this Court is invoked is, that this is an appeal from an order or judgment of a three-judge District Court of the United States (convened pursuant to 28 U.S.C.A. §2284) in an action in which a mandatory order, in effect a mandatory injunction [see, *Alabama v. United States,* 5 Cir., 304 F. 2d 583, 590, *affirmed,* 371 U.S. 37; *Carver v. San Pedro etc. R. Co., CC. Cal.,* 151 Fed. 334, 338-339],

was issued commanding the Legislature of the State of California to reapportion the Senate of that Legislature so that its members will be elected from districts of substantial equality in population. [*Per Curiam Order*, R. 153 (pp. 20-21.).*] The action in which that order was made was one commenced and maintained by appellee under the Federal Declaratory Judgment Act [28 U.S.C.A. §§2201-2202] for a declaration that the provisions of the constitution and statutes of the State of California relating to the organization, composition and election of members of the Senate of the Legislature of the State of California were invalid as repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and for appropriate injunctive relief in that regard. [*Complaint*, R. 2 (p. 6, par. XIV; pp. 9-14, 19-21).]

2. The date of the judgment sought to be reviewed and of its entry is December 3, 1964. [*Per Curiam Order*, R. 153 (p. 1).] There was no petition, application or request for rehearing. A notice of appeal to this Court was filed in the United States District Court, Southern District of California, Central Division, on December 31, 1964. [*Notice of Appeal*, R. 174.]

3. The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C.A. §1253.

4. Cases believed to sustain that jurisdiction are: *Florida Lime etc. Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75-81, 84; *Reynolds v. Sims*, 374 U.S. 802,

*The number following the abbreviation "R" is the page of the Transcript of Record at which the cited document appears. The following reference in parentheses is to the internal pagination of that document.

(probable jurisdiction noted), and *Reynolds v. Sims*, 377 U.S. 533, 554 (decided on the merits); *Anderson v. Martin*, 375 U.S. 399, 400-401.

5. The State constitutional and statutory provisions whose validity were drawn in question are set forth respectively in Appendices "C" and "D" to this Statement. They may be found in the official edition as follows:

(a) *Constitution of California*, article IV, section 6 — Cal. Stats. 1927, p. *lxxxvii*.

(b) *California Elections Code*, sec. 30100 — Cal. Stats. 1961, c. 23, p. 879; *Ibid.*, c. 1235, p. 2983.

Question Presented.

1. Did the District Court correctly determine that equal protection of the laws was denied a citizen and elector of the most heavily populated county of the State of California by that State's constitutional and statutory provisions for a legislature of two houses, one of which was, and the other of which was not, required to be apportioned in accordance with population; and, on that account ordering the legislature of the State, within a time fixed in the order, to reapportion the latter house on a population basis, in default of which the court would itself effect such a reapportionment?

Statement of the Case.

The Constitution of the State of California provides for a bicameral legislature, consisting of an Assembly of 80 members [*Cal. Const.*, art. IV, sec. 5*], elected from

*The official text of the Constitution of California as amended to the times material here is found in Cal. Stats. 1961, p. *vii, et seq.*

districts "as nearly equal in population as may be" [*Cal. Const.*, art. IV, sec. 6]; and a Senate of 40 members. [*Cal. Const.*, art. IV, sec. 5.] In the formation of senatorial districts no county or city is to be divided nor contain more than one such district. Counties of small population, however, are to be grouped in districts of not to exceed three counties in any one district. [*Cal. Const.*, art. IV, sec. 6.] The effect of these provisions, of course, is that Senatorial districts, in the main, follow county lines and are not equal in population. [*Stipulated Statement of Facts*, R. 35 (p. 2, par. II).] That state of affairs was not a fortuitous or haphazard result of population shifts and growth. It was the consequence of a deliberate and informed choice of the people themselves, since four times reaffirmed by them, designed to prevent absolute domination of every branch of State government by a demographic majority concentrated at the time in three of the State's 58 counties containing less than 3% of the State's vast territory and much less than a proportionate part of the State's natural resources, businesses, industries, and other economic, social and political interests. [See note 1, *infra*.]

The present system of legislative districting came into being in 1926 when the electorate of the State was given a clear choice between two plans of legislative apportionment. One plan provided for a legislature of which both Houses were to be elected from districts equal in population; the other plan for a legislature of which one house, the Assembly, was to be so elected, and the other, the Senate, was to be elected from districts formed along geographic and county lines.[1] [*Stipulated Statement of*

[1] These two propositions — numbered 20 and 28, respectively — were submitted to the people at the general election of 1926.

Facts, R. 35 (p. 3, par. IV).] By a decisive preponderance in favor of the latter plan and against the former, the people clearly chose the so-called Federal plan. It has been the law of California ever since, notwithstanding four efforts to do away with it and constitute both houses of the legislature on the basis of population.[2]

Proposition 20 proposed to continue the already existing system of basing each House on population and requiring reapportionment after each decennial census, but added a Reapportionment Commission to act if the Legislature failed so to reapportion. Proposition 28 also added such a Commission, but following the so-called Federal Plan, it substituted for a popularly based Senate one whose members were elected from districts to be fixed by the legislature, but which were not expressly required to be equal in population. [Cal. Stats., 1927, p. *lxxxvii, et seq.*]

Two considerations gave rise to the submission of those propositions: first, the Legislature's failure for three successive sessions after the 1920 Census to reapportion; and, second, the growing concern throughout the State over the concentration of population in three of the State's 58 counties and the consequent power of those three counties — comprising less than 3% of the State's territory and containing only a minority of the State's resources, agriculture, industries, and economic and social interests — to control every branch of the State government. [*Report of California Study Commission on Senate Apportionment* (Cal. State Printing Office, 1962) pp. 6-9. (This report is hereinafter cited as "Study Commission Report.")]

The official argument submitted to the voters in favor of the Federal Plan was, in substance, that growth of city populations would have the effect "of consolidating political power in the inhabitants of 3 per cent of the area of the State to the prejudice of the representative rights of the balance of the population who inhabit 97 per cent of the area of the State . . . The measure will preserve to rural California and the great agricultural producing areas which compose it, the control of one house of the state legislature . . ." The gist of the argument against the proposal was that the "'only fair way is to base representation on population, in accordance with the fundamental principles of our government that the majority shall rule." [*Study Commission Report,* pp. 8-9; also *Stipulated Statement of Facts,* R. 35 (p. 4, par. V (Ex. 5).]

[2]Efforts to substitute a popularly based Senate for the Federal Plan were rejected by the people of California by substantial majorities in state-wide elections in 1928, 1948, 1960.

Since the adoption of the Federal Plan in 1926 the State's population has grown almost beyond belief, and as a consequence, the trend toward urban concentration already strongly evidenced in 1926 has become intensified. Today, as was similarly the case in 1926, Alameda, San Francisco, and Los Angeles counties, in which are found the great San Francisco Bay and Los Angeles metropolitan complexes, have about as much (49%) of the State's population as the rest of the state.[3] The State's three most populous counties, Los Angeles, San Diego and Alameda, have 51.4% of the population. Along sectional lines, four counties in Southern California — Los Angeles, San Bernardino, Orange and San Diego — have 52.6% of the State's population. Each of these populous counties is proportionately represented in the Assembly on a population basis.[4] In the

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and 1962, notwithstanding that a majority of the State's population was found in the few counties whose Senatorial representation would have been greatly increased by the success of the effort. [*Stipulated Statement of Facts*, R. 35 (p. 3, par. IV); *Amendment and Supplement to Stipulated Statement of Facts*, R. 76 (p. 3, par. XXI); *Study Commission Report*, pp. 9-15, 62-69.] In each of those elections the official arguments in favor of the proposals strongly stressed the inequalities and disparities of representation in relation to population that were produced by the Senate's territorial rather than population base. [*Ibid.*]

[3]All population data are from the 1960 Census unless otherwise indicated. [*Stipulated Statement of Facts*, R. 35 (p. 1, par. I).] These data, and all other demographic statistics to which reference is made in this brief will be found, unless otherwise attributed, in "Intervener's Memorandum re Judicial Notice," R. 107, *passim*, referred to hereafter as "*Jud. Notice Memo.*"

[4]Los Angeles, the most populous county, with 38.4% of the State's population has an Assembly representation of 39.75%. [*Cal. Elections Code*, sec. 30201, subds. 38-68, Cal. Stats. 1961, c. 23, p. 895, *et seq.*] The four Southern California counties that together have 52.6% of the population have 51.25% of the Assembly. The State's four most populous counties — Los

Senate, however, twenty-seven counties, being the most populous ones, have one Senator each. The remaining 31 are grouped into thirteen districts, with one Senator from each district. [*Cal. Elections Code*, sec. 30100, Cal. Stats. 1961, c. 23, p. 879, *et seq. Stipulated Statement of Facts*, R. 35 (p. 2, par. II, Ex. 2).]

There are in California, 348 populated places having more, and 166 having fewer than 2500 persons. Fifteen of these have a population in excess of 100,000. Ten counties have a rural population (as defined by the Bureau of the Census) of less than 20% of their total population, but in 31 counties the rural population exceeds 50% of the total. Forty-five counties have a population of less than 250,000 people; two are in excess of 1,000,000, of which one, Los Angeles, is in excess of 6,000,000; five range from 250,000 to 500,000; and the other six are in the 500,000 to 1,000,000 bracket. [*Jud. Notice Memo.*, R. 107 (pp. 5-6); *Stipulated Statement of Facts*, R. 35 (p. 1, par. I, Ex. 1).]

The most sparsely populated parts of California are the mountain countries, situated mostly in the northern part of the State and embracing the Sierra Nevada and Cascade ranges. Though small in population, these counties contain virtually all of the State's timber resources and most of its water, much needed in the more populous centers. [*Jud. Notice Memo.*, R. 107 (pp. 2-3, 8-9).] Three of these counties — Alpine, Inyo and

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Angeles, San Diego, Alameda and San Francisco — with 55.4% of the population have 57.5% of the Assembly.

There are, to be sure, some arithmetical differences among the 80 Assembly districts. The districting, however, accomplishes the purpose of apportionment by population, *i.e.*, majority control. [See, *e.g.*, *Forston v. Dorsey* (Jan. 18, 1965), 379 U.S. ___; *Reynolds v. Sims*, 377 U.S. 533, 579.]

Mono — form the 28th Senatorial District, with a total population in 1960 of 14,196. The district contains 13,842 square miles, which makes it the second largest district in the State, exceeded only by the 36th, consisting of San Bernardino County. The next district in size (11,209 square miles) is the 1st, composed of the mountain counties of Modoc, Lassen and Plumas. Its 1960 population was 33,525. The most populous district is, of course, the 38th, composed of Los Angeles County, with a population of 6,038,771 and an area of 4060 square miles. [*Stipulated Statement of Facts,* p. 2, par. III (Ex. 4); *Study Commission Report,* p. 61.]

The distribution of population among the senatorial districts is as follows:

Population	No. of Districts
Under 50,000	5
50,000 to 100,000	10
100,000 to 150,000	6
150,000 to 200,000	5
200,000 to 300,000	2
300,000 to 500,000	4
500,000 to 700,000	3
700,000 to 900,000	2
900,000 to 1,100,000	2
Over 6,000,000	1

All political power, and control of all branches of government in California, save only the Senate, are in the hands of a popular majority, concentrated in a small part of the State's area. That area contains substantially less than a proportionate part of the State's resources

and interests.[5] [See *Jud. Notice Memo.*, R. 107 (pp. 2-3, 6-22).]

California is more than just a big state or a populous one. It is a greatly diversified one, whose peoples, interests, and resources extend across the whole range of business and industry, geography, races, and human activity. Thus, speaking generally, in this State are found the vast timber, mineral and water resources of the northern counties; the many and varied agricultural products of the Great Valley, the equally varied but different agricultural products of the southern counties; the industrial complexes and financial and commercial concentrations in and around the State's great seaports — San Francisco Bay, Los Angeles-Long Beach and San Diego; the variations in the nature and richness of its lands, that range through all degrees from below-sea level desert to snow-covered mountains of massive ruggedness; and a great variety of racial strains, frequently grouped together in some one county, each importing into the State some of their native customs, beliefs and *mores*.

Out of this diversification and dispersal of peoples, interests and resources there exists in the State not only a high degree of interdependence of its various areas, but also a conflict of interests and sectional competition

[5]The Governor, and most other State executive officials are elected by popular vote from the State at large. [*Cal. Const.*, Cal. Stats. 1961, p. *vii*, *et seq.*, art. V, secs. 2, 15, 17.] The most numerous of the two houses of the Legislature is elected on a population basis [*Cal. Const., loc. cit.*, art. IV, secs. 1, 3, 6]; and the people have the power of direct legislation by a majority vote. [*Cal. Const., loc. cit.*, art. IV, sec. 1.] The judges of the trial courts are elected; and the appellate judges, while appointed in the first instance, must submit to a general election every twelve years. [*Cal. Const., loc. cit.*, art. VI, secs. 3, 6, 11, 26.]

and rivalries that, at the hands of a preponderant majority in control of all branches of the State government, conceivably could lead to disregard or abuse of the interests of the minority.[6] [See, *Jud. Notice Memo.*, R. 107, *passim*, in which the demographic and other data supportive of this statement are collated in considerable detail.]

In 1961-62 an intensive study of the problem of Senatorial representation was made by a citizen's commission created by the legislature. It recommended changes in the constitution of the Senate that would have substantially increased the representation of the populous counties. [*Study Commission Report*, pp. 44-47, 78-80.] The report was followed by an initiative proposal that would have enacted those recommendations, but in a form more acceptable to the urban interests. It was submitted to the people at the general election of 1962 and decisively defeated, notwithstanding that the majority of the State's population lived and voted in the urban centers. [*Amendment and Supplement to Stipulated Statement of Facts*, R. 76 (p. 3, par. XXI).]

There then began a campaign to accomplish, through invocation of the judicial power, the objective the people had just and for the fifth time rejected. Three class suits were begun in the State Supreme Court, seeking a

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[6]For one example, 72% of the State's water runoff is north of Sacramento, but 77% of its water requirements are south of that point. Southern California has only a very small part of the State's water, but has the greater part of the State's water needs. On the other hand, 60% of the State's irrigable land is in the counties of the Central Valley, which produce about half of the State's crops but contain less than 20% of its people. [*Jud. Notice Memo.*, R. 107 (pp. 8-9).] A water-hungry population in Los Angeles united by that interest, and in control of all governmental power, could easily inflict an injustice upon the water-needy minority of the Valley.

mandamus to compel reapportionment of the Senate on a population basis. The requested writ was in each instance denied, without opinion.[7] [*Jud. Notice Memo.*, pp. 25-26.] In one of them an appeal was taken to this Court which, on October 12, 1964, was dismissed for want of jurisdiction. [*Yorty v. Jordan*, 379 U.S. 8.] The appellee at bar commenced a similar action in the State court of first instance, which he dismissed without prejudice before a demurrer to the complaint could be heard. [*Stipulated Statement of Facts*, R. 35 (p. 10, par. XII).]

The instant case was pending in the District Court at the same time as the State litigation. It had been commenced by the appellee as a citizen of the United States and the State of California, and as an elector and registered voter of Los Angeles County, in his own behalf and of all others similarly situated. [*Complaint*, R. 2 (p. 2, pars. III, IV.)] In it he alleged, speaking generally, a denial of equal protection of the laws by reason of the fact that a vote for a State Senator in Los Angeles County had been debased and was not equal to such a vote in other counties of the State. This state of affairs was brought about, it was alleged, by virtue of the fact that the Senate was not elected from districts of equal population, but from counties or districts made up of several counties that varied greatly from each other in population. [*Complaint*, R. 2 (pp. 6-15).] The re-

[7] In the third of these, there was a brief memorandum stating that "any determination by this court on the question of legislative reapportionment would be premature until such time as the Legislature has had an opportunity to consider the matter and to take such action as it may deem to be required pursuant to the expression of the United States Supreme Court in Reynolds v. Sims, 32 U.S.L.W. 4535 [377 U.S. 533] and companion cases." [*Jud. Notice Memo.*, R. 107 (p. 26).]

lief prayed for was a declaration of rights and an appropriate injunctive or coercive order that would compel reapportionment of the Senate on a population basis and enjoin the holding of Senatorial elections under the existing provisions of the California constitution and statute.

A three-judge court was duly convened pursuant to 28 U.S.C.A. § 2284. The defendants moved to dismiss on jurisdictional grounds. The motion was denied, the Court holding that it had jurisdiction and that the subject matter was justiciable. Injunctive relief against the then imminent general election of 1962 was, however, denied, as a State remedy was then available — the initiative measure to which we have already referred. Jurisdiction was retained, after which the Senate intervened in the action; and the cause was set for hearing. [See, *Per Curiam Order*, R. 153 (pp. 2-3, 5).] The hearing was had on stipulations of facts entered into by the parties [R. 35, 76, 90, 147], and the Senate's request for judicial notice of various demographic and statistical data bearing upon the State's size and geographic, economic, social and natural diversity and complexity. [R. 107.] The result of the hearing was the order from which this appeal is taken.

In essence, the District Court found that this case was indistinguishable from *Reynolds v. Sims*, 377 U.S. 533, and its companion cases and that, accordingly, California's apportionment of its Senate upon a basis other than population was an invidious discrimination against the residents of Los Angeles County. It ordered the Legislature of the State of California to "reapportion the California State Senate consistent with this

opinion, and the several existing United States Supreme Court decisions on the subject, so that the *Reynolds'* doctrine of 'districts of substantial equality in population' exists." [*Per Curiam Order,* R. 153 (p. 21).]

It further ordered that if the Legislature "fail to discharge its duty to fairly, adequately and validly redistrict State Senatorial Districts . . . by not later than July 1, 1965, this Court will, before or after that date, hold further hearings, or motions; devise redistricting plans; and make such further orders or take such further steps as may be necessary or appropriate (either upon its own motion, or on the motion of any party or intervenor) . . .;" and to that end jurisdiction was retained. Carr, D. J., dissented without opinion. [*Per Curiam Order,* R. 153 (p. 21).]

In arriving at that conclusion the District Court expressly held that the requirement of substantial population equality of election districts was now a constitutional imperative; that it was of no material consequence that the present system of apportionment was one that the people of California had freely selected for themselves; and that California's great diversity of peoples, resources, interests and activities could not be taken into account in determining whether California's apportionment is based upon a rational classification. [*Per Curiam Order,* R. 153 (pp. 7-11, 13-16).] The Court did not state or define the extent to which, if at all, the limitations of the State constitution could be disregarded in any reapportionment designed to comply with its order.

Substantiality of the Question.

1. The question of the constitutionality of a senatorial apportionment that has been repeatedly and clearly chosen by the free and open vote of the people whose voting rights are sought to be protected by a different apportionment, comes here on a record that is substantially different from the cases that have preceded it. It is the only one of the cases where the challenged apportionment plan was freely adopted by an electorate having a clear cut choice between it and one based on population. As we have seen, at the time California's federal plan of apportionment was adopted by the people at large, two measures were on the ballot differing only in the base of senatorial representation they would have provided. One of them would have set up a Senate based solely on population; the other a Senate based on geographical or county lines. The argument for and against these propositions also posed the question squarely — a Senate that would conform to the principle of majority rule, or one that would give the minority of the people a check against the otherwise unqualified political power of the majority concentrated in a small part of the State's area. The difficulties with the alternative plans that in Colorado prevented a clear cut choice [see, *Lucas v. Colorado General Assembly*, 377 U.S. 713, 731] are not to be found in the two propositions put before the people of California in 1926. And, of course, the efforts made since then to repeal the popular choice, again gave the electorate an opportunity to substitute for the existing Senatorial apportionment, one that would have given greater recognition to the population factor and that would have greatly increased the representation of the populous areas. [See, note 2, *supra.*]

This Court has not yet passed upon a legislative apportionment that the people of a State, a majority of whom live and vote in the populous centers of the State, have repeatedly voted to adopt and retain. There is a great deal to be said for the proposition that the people, voting in circumstances giving free sway to the will of the majority, are entitled to the kind of legislature they want. Having and exercising the opportunity fairly and clearly to express that will, it cannot be said that what the majority did was invidiously to discriminate against themselves. That is a different case from one, like Colorado's, in which the alternatives were not clearly or sharply put to the voters.

There is, we submit, more than a touch of irony in the assertion that a legislature based strictly and for all practical purposes only on population is necessary to protect the majority of the people against the minority, when it is that majority that has freely decreed that they prefer a legislature geographically constituted. A constitutional right or privilege may be waived by the one for whose benefit it is secured. This Court has said that the right to vote is a personal one. [*Reynolds v. Sims, supra,* 377 U.S. at 561.] Such a right is waivable.

2. Reapportionment of a State legislature is not a purely mechanical process. It consists of something more than applying population figures to a map of the State. Indeed population is not the only factor that may be considered, so long, at least, as the end result is a fair approximation of the one man-one vote criterion. [*Reynolds v. Sims, supra,* 377 U.S. at 577-579.] The process is essentially a legislative one, involving nice questions of choice or compromise among conflicting policies and the demands of practical political, geographic and

economic considerations. [Harlan, J., diss., *Baker v. Carr*, 369 U.S. 186, 349.] Every case, therefore, has to be considered on its own facts and in relation to the conditions existing in the State from which the case comes. [*Reynolds v. Sims, supra*, 377 U.S. at 578.]

California is unlike any other State whose reapportionment troubles have come to this Court. Its vastness of size and resources, its diversity of geography, and its complexity of economic, industrial and agricultural structures, make for problems of government that are in many ways unique and certainly different from those of more homogenous states. To govern such a State is not merely a matter of always or slavishly following the will of the majority. Majorities are no more above self-interest than individuals; and it is the essence of constitutional government that the minority should be protected against the excesses of the majority. ". . . Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be unsecured." [*The Federalist*, No. 51.] To be sure, farms and businesses do not vote. But the right of one in the popular minority to vote will be illusory unless that minority has the means of protecting from abusive action of the majority those economic and social interests that make it possible for the human voter to live in reasonable comfort and security. Constitutional guarantees of personal rights will not prevent political action abusive of those sectional or group interests upon which that comfort and security in large part depend. [See, note 6, *supra*.]

In *Baker v. Carr*, 369 U.S. 186, 226, it was pretty clearly indicated that a claim of malapportionment of a State legislature raises justiciable questions under

the Equal Protection Clause. "Judicial standards under [that] Clause," it was said, "are well developed and familiar . . ." Surely, one of the best developed and most familiar of those standards is that differentiation by classification based on rational grounds is not a denial of equal protection; the "constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . ." [*McGowan v. Maryland*, 366 U.S. 420, 425-426; *Allied Stores v. Bowers*, 358 U.S. 522, 527; *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 583, 584.] Each malapportionment case stands on its own bottom. [*Reynolds v. Sims, supra*, 377 U.S. at 378.] It is, therefore a substantial question, needing full argument and briefing, whether California's unique factual situation and the particular history of the adoption of its system of legislative apportionment provide the bases of a classification resting on rational grounds. Granting all the differences that may exist from the history of the organization of the Federal Congress, it is still a fact that that system shows that a bicameral legislature composed of a popular and a geographical house in order to diffuse political initiative [see, *MacDougall v. Green* 335 U.S. 281, 283-284], is not an irrational plan. That is the real point of the Federal analogy, and one which its history does not make inapplicable to a State adopting the same plan for the same purpose — it is evidence of rationality.

There is no question in California of any hidden or sophisticated effort by legislative apportionment to deny to any minority, whether it be racial, vocational or residential, an effective voice in the State's government.

The purpose is exactly the opposite. It is to give the popular minority, as well as the majority, a means of effective participation in the government of the State. As California's government is now constituted the majority, regardless of its make-up, has an effective, in- the predominant voice in the governing process. ... State's present Senatorial apportionment, however, gives the minority something more than the right of ineffective protest. It provides it with the affirmative protection of an effective participation in the process by giving it in one legislative House a check that may delay a concentrated majority from exercising its will without let upon the otherwise unprotected minority. It is a substantial question, whether the purpose to provide such a check and balance is an invidious discrimination against those who have the power to control all else of the State's government and ultimately to write their wishes into law. Only in the Senate can the majority be compelled to give some heed to the interests of the minority. If agreement or compromise is not there achieved, the popular majority can always have its way by resort to California's initiative process.[8] [*Cal. Const.*, art. IV, sec. 1.] The decisions so far rendered by this Court do not necessarily foreclose this question beyond the possibility of rational differentiation. The

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[8]Between 1880 and 1962 there were submitted to the people of California, either by initiative petition or by the legislature, 583 amendments to the constitution, of which 335 were adopted. Between 1912 and 1962, 138 initiative measures were submitted, of which 37 were approved. [*Amendment and Supplement to Stipulated Statement of Facts*, R. 76 (p. 2, pars. IX, X).] "... California voters have consistently examined a larger number of policy matters at the regular biennial elections than have the voters of any other state . . ." [Crouch & McHenry, *California Government*, p. 100.]

question is one to the solution of which argument and plenary consideration are needed.

3. Compliance with the order of the court below is virtually impossible in California without disregard by the State legislature of the provisions of the State's constitution that fix the size of the Senate at 40 members; and require that they be elected from districts in the formation of which no county may be divided nor any part of a county united with another. [*Cal. Const.*, art. IV, sec. 6.] It is a question of considerable substantiality whether in apportioning on the basis prescribed by the court below the California legislature may disregard, and if so, to what extent, those provisions of the State constitution. No guidelines in that regard were marked out by the court. It did no more than to hold that the present apportionment of the Senate was discriminatory. It did not specify which, if any, of the State constitutional provisions were responsible for that state of affairs and, for that reason or any other, were repugnant to the Equal Protection Clause. The answer to that question the legislature was left to fathom for itself.

Similar provisions in the constitution of Colorado have been held to preclude validity of a reapportionment statute violating them, notwithstanding determination by a United States District Court [*Lucas v. Forty-Fourth General Assembly*, D. Colo., 232 F. Supp, 797] that the statute was inoffensive to the Equal Protection Clause. [*White v. Anderson* (Colo. 1964), 394 P. 2d 333, 335.] This Court seemingly has approved that approach, as it vacated part of the judgment in *Lucas* for further consideration in the light of *White*. [*Forty-Fourth General Assembly v. Lucas* (Feb. 1, 1965), 379 U. S. .....]

Based on the 1960 census, a Senatorial district in a 40-member Senate on an equality-of-population basis should contain 392,930 people[*] to achieve that figure in Northern California would require one district containing fifteen or more contiguous counties, with more than one-fourth of the State's area — an area larger than that of fifteen States, among which are Massachusetts, New Jersey and Florida. The State constitution, however, forbids grouping the counties of small population into districts containing more than three counties. A similar difficulty is met in districting counties with a population exceeding the number necessary for one district, as the constitution proscribes dividing any county. And, in the case of a county large enough for several districts, *e.g.*, San Diego, difficulty would be encountered with a fractional remainder because of the provision that no part of a county shall be united with another.

These few instances illustrate the difficulties in the way of a compliance with the lower court's order by the date fixed, unless the State constitution be largely flouted. Without guidelines from the courts, it is not unlikely that a constitutional amendment will be needed. [See, *White v. Anderson, supra,* 394 P. 2d 333.] Such an amendment requires submission to the people by the legislature (two-thirds of each house concurring), at an

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[*] California's rapid growth has already made the 1960 census obsolete. There are very likely about 18,000,000 people in California now [*California Population 1964*, (Calif. Dept. of Finance, Budget Division, Sacramento, 1964), Table 3], which would require districts of about 450,000 in population.

election to be held when expedient [*Cal. Const.*, art. XVIII, sec. 1); or submission by initiative, which requires an organized solicitation of signatures throughout the State. [*Cal. Const.*, art. IV, sec. 1; *Stipulated Statement of Facts*. R. 35 (p. 4, par. VI).] Submission of a constitutional amendment by a legislature that has not been reapportioned may itself be challenged, thus prolonging the litigation. [See, *Fortson v. Toombs* (Jan. 18, 1965), 379 U. S. .....]

If the courts are to be enmeshed in the political processes of reapportionment, and if those processes are to go on free of the procedural and substantive restraints of State constitutions, coercive direction ought at least to point the way with reasonable certainty. A legislature ordered to do that which cannot be accomplished without violating the organic law of its State, ought to be told what it may lawfully do, or given an opportunity to get the answer from the State courts. [See, *Yorty v. Anderson*, 60 Cal. 2d 312, 317, 384 P. 2d 417, 420, 33 Cal. Rptr. 97-100.] It should not be left to guess, with all the waste of time, effort and public money and the unsettling effects upon other legislation that will ensue if it happens to guess inaccurately the future decision of the courts.

4. The question whether in default of legislative reapportionment a federal court will carry on the process by itself is one, it has been said, that has not been foreclosed or obviated by *Reynolds v. Sims*, 377 U.S. 533; and it is one "which should be determined only

after the fullest plenary and most deliberate consideration on the part of this Court . . ." [Mr. Justice Harlan, dissenting and concurring in *Parsons v. Buckley*, 379 U.S. .... (Jan. 12, 1965).] That question is squarely involved in the instant case, for if the California legislature does not reapportion by July 1, 1965, whether from inability or unwillingness makes no difference, the lower court has said quite plainly that it will,[10] [*Per Curiam Order*, R. 153 (p. 21).] The question does not arise here as it did in *Parsons*, in the context of a stipulation to which the State's representatives were parties and in which they agreed to reapportionment by the court. It arises from a coercive order which was opposed by the State's representatives and the legislative house at whose organization the order is directed.

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[10]Because the court below retained jurisdiction of the cause for the purpose of itself reapportioning the California Senate if the State legislature failed to do so, it may be argued that the order appealed from is only interlocutory. It is evident, however, from the face of the order that it was intended to be a final disposition of the merits of the cause, *i.e.*, of the question whether California's legislative apportionment system is constitutional. The relief awarded was not merely to preserve the status quo *pendente lite*. It was coercive and final, for if the court's mandate be obeyed there is nothing more to be done in the cause; and the legislature will have been finally, not provisionally, reconstituted. The permanence of that order does not have to await any further determination. It was therefore, a final injunction. [See, *Speer v. Rural Special School Dist.*, 8 Cir., 100 F. 2d 202, 206; *Hamilton Watch Co. v. Benrus Watch Co.*, 2 Cir., 206 F. 2d 738, 742.]

Conclusion.

Probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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APPENDIX "A."

Opinion of the Court Below.

Since the historic pronouncement by the Supreme Court of the United States in *Baker v. Carr*, 369 U.S. 186 (decided March 26, 1962), the federal courts of the United States have been literally flooded with suits by voters, alleging either "the debasement" of their vote by state legislative action, or by the failure or alleged inability of the state legislature to act pursuant to constitutional requirements, which in either event have resulted in "invidious discrimination" against the litigant, and others in his class, which amounts to or results in a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This is one of those cases.

Plaintiff, Phill Silver, filed this class action on July 16, 1962, as a citizen of the United States and of California, and as an elector and registered voter of Los Angeles County, on his own behalf and on behalf of all other citizens, electors, and registered voters of the State of California, similarly situated. The defendants are sued in their representative capacities as State officials, performing duties in respect to State elections.

The complaint alleged a deprivation of rights under the California Constitution and under the Equal Protection Clause of the Fourteenth Amendment. It is asserted, and we hold, that this court has jurisdiction under the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and 28 U.S.C. § 1343(3). Relief is prayed for under 28 U.S.C. §§ 2201-2202.

Since relief was sought under the Federal Declaratory Judgment Act (28 U.S.C. §§ 2201-2202), a three-

judge District Court was convened. The plaintiff prayed for injunctive relief to enjoin the 1962 General Election as it applied to the election of State Senators. Plaintiff alleged that the present apportionment of the California State Senate, (Cal. Const., Art. IV, Sec. 6, as amended in 1926), deprived him and all others similarly situated of due process of law and the equal protection of the law. Furthermore, he alleged that his right to equal suffrage in a free and equal election had been deprived in violation of both the California Constitution and the Fourteenth Amendment of the U.S. Constitution.

On August 30, 1962, this court handed down its opinion and order (Civil Action No. 62-953 MC) holding that it had jurisdiction, *Baker v. Carr, supra* at 204-208, and that the subject matter of this suit was justiciable, not a nonjusticiable political question regarding the relationship between the judiciary and its coordinate branches of the Federal Government. *Baker v. Carr, supra* at 208-236, especially at 217. All of defendants' motions to dismiss were denied. However, this court, while retaining jurisdiction, denied any injunctive relief at that time, as there was then available to the plaintiff a State remedy, namely, the Initiative Measure on the 1962 General Election Ballot, Proposition 23, which, if passed, would have reapportioned the State Senate.

II

The California Constitution of 1849 and the revised Constitution of 1879 provided for representation on the basis of population in both houses of the Legislature (*Cal. Const.* 1849, Art. IV, §§ 28-29; *Cal. Const.* 1879, Art. IV, § 6) and vested the entire lawmaking power of

the State in that body. (*Cal. Const.* 1849, Art. IV, § 29; *Cal. Const.* 1879, Art. IV, § 6).

In response to Governor Hiram Johnson's call to allow the people the right to check any abuse of power by the Legislature, the Legislature in 1911 submitted to the voters of the state a constitutional amendment, which was passed by the electorate, reserving to them the right to initiate and enact laws, which is the initiative, and to prevent laws enacted from becoming effective, which is the referendum: (*Cal. Const.* Art. IV, § 1; Hichborn, *Story of the California Legislature of 1911, p.* 93).

After the 1920 decennial census, the 1921, 1923 and 1925 sessions of the State Legislature failed to enact any reapportionment scheme, as demanded by the U.S. Constitution, Art. I, § 2. The people of the State responded to the inaction of the legislators and on the 1926 election ballot they qualified two proposals by initiative for the consideration of the electorate. Proposition 20 would have retained the apportionment of the two houses as they then existed, namely, on a population basis; whereas, Proposition 28 presented the so-called "Federal Plan" to the electorate, which would retain the Assembly's apportionment on a population basis, but the State Senate was to be apportioned largely on a geographic basis. Proposition 28 was based on existing representation in the Congress of the United States. Proposition 28 was adopted, and Proposition 20 was rejected. Thus, since 1926, California has retained this "Federal Plan" in its apportionment of seats in the California Legislature. It is this amendment to Art. IV, § 6 of the California Constitution, which the plaintiff challenges here. Since the adoption of Proposi-

tion 28 in 1926, the State Legislature has never failed to comply with the Federal requirement of apportioning its seats every ten years in accordance with the Federal Census.

Presently, the State of California is divided into forty senatorial districts. Furthermore, no county is to have more than one representative in the Senate, and no Senator is to represent more than three counties. (*Cal. Const.* Art. IV, § 6, *Cal. Elections Code* § 30100). There is no controversy here over the constitutionality of the apportionment of seats in the State Assembly, containing 80 members, since the apportionment in the lower house is based solely on population. (*Cal. Const.* Art. IV, § 6; *Cal. Elections Code* § 30201).

Since the Amendment to Article IV, Section 6 was adopted in 1926, there have been four attempts by the initiative process to revert back to the pre-1926 apportionment. But the electorate in 1928, 1948, 1960 and most recently in 1962, has rejected these initiatives. Since 1951 there have been numerous bills introduced in the State Legislature for the apportionment of the State Senate on a population basis, but all of these attempts have been killed by the Senate or died without any action by both houses.

III

It is pertinent to note the various population disparities which exist in the present apportionment of seats in the California State Senate under Art. IV, § 6, as amended in 1926. For example, according to the last Federal Census (1960), the population of the 38th Senatorial District, comprising Los Angeles County, is 6,380,771. The population of the 28th Senatorial Dis-

trict, comprising Mono, Inyo, and Alpine Counties, is 14,294. This is a ratio of almost 450:1. Other great disparities exist with respect to other Senatorial Districts, i.e., 40th Senatorial District, San Diego County, 100:1 as compared to District 28; 16th Senatorial District, Alameda County, 90:1 as compared to District 28, 14th Senatorial District, San Francisco County, 60:1 as compared with District 28; 35th Senatorial District, Orange County, 50:1 as compared to District 28, to name a few. Thus about one-third of the total population of the State of California today controls more than two-thirds of the representation in the State Senate. (See U.S. Census of Population, 1960, California, U. S. Department of Commerce, Bureau of the Census, p. 23).

IV

INTERVENTION OF THE STATE SENATE

The California State Senate's motion to intervene as a substantially interested party was granted because it would be directly affected by the decree of this court. Fed. R. Civ. P. 24(a)(2); *Calif. Const.* Art. IV, §§ 1, 4, 5 and 6; *People v. U.S.*, 180 F.2d 596 (9 Cir.); *Kozak v. Wells*, 278 F.2d 104; *Ex Parte D. O. McCarthy*, 29 Cal. 395.

V

LEGAL EFFECT UPON THIS SUIT OF THE VARIOUS LITIGATION INTIATED IN THE CALIFORNIA SUPREME COURT BY APPLICATIONS FOR WRITS OF MANDAMUS, WHICH WERE ALL DENIED

In *Yorty and Bonelli v. Anderson*, 60 C.2d 312, 33 Cal. Rptr. 97, 384 P.2d 417 (1963); *Yorty and Bonelli*

v. Jordan, Sac. No. 7543 (appealed to the U. S. Supreme Court, October 1964 Term, Case No. 250, and dismissed for want of jurisdiction on October 12, 1964, ... U.S. ...); and *Yorty* and *Bonelli v. Jordan,* Sac. No. 7582, the plaintiffs sought a writ of mandate from the Supreme Court of the State of California to compel a reapportionment of the Senate of the Legislature of the State of California on a population basis.

In denying a writ in the last named case, the Supreme Court of California said:

> "The petition to intervene and the petition for the writ of mandate are denied for the reason that any determination by this court on the question of legislative reapportionment would be premature until such time as the Legislature has had an opportunity to consider the matter and to take such action as it may deem to required pursuant to the expression of the United States Supreme Court in *Reynolds v. Sims,* .... U.S. ...., and companion cases."

None of these cases have any effect on the present suit, for in *Yorty v. Anderson, supra,* the case was determined on a non-federal question, i.e., the plaintiff had misjoined the wrong party as defendant. The proper party defendant should have been the Secretary of State, not the members of the Reapportionment Commission, which had no jurisdiction to reapportion the legislature, unless the Legislature failed to act, which it had not. The other two cases, resulting in denials of petitioners' request, were denied without any opinion. It is apparent that none of these cases have directly reached the federal constitutional question of an alleged

denial of petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment, and, as such, they have no relation to our decision here.

VI
DELAY

Although the plaintiff herein originally sought injunctive relief, which this court temporarily denied, his position subsequently changed. Despite the fact no initiative petitions proposing reapportionment of the California Senate had been filed with the State by June 25th, 1964 (the last day for filing such initiative proceedings) and that none of the twelve proposed amendments to the California Constitution, appearing on the November 3rd, 1964 election ballot, related to reapportionment of the California Senate, it was stipulated (Supplementary Stipulation of Facts No. 3, ¶ XXI): "The plaintiff does not seek any injunctive or mandatory relief in connection with the November 3, 1964 general election."

This court deemed it proper, in view of the lack of demand for injunctive relief, to obtain the benefit of the argument of plaintiff, and original defendants, and more particularly that of the intervening Senate, as to the meaning and effect of the group of cases on this novel and revolutionary legal theory, decided by the Supreme Court of the United States on June 15, 1964. *Reynolds v. Sims*, 377 U.S. 533; *WMCA, Inc. v. Lomenzo*, 377 U.S. 633; *Maryland Committee v. Tawes*, 377 U.S. 656; *Davis v. Mann*, 377 U.S. 695; *Lucas v. Colorado General Assembly*, 377 U.S. 713.

These cases dispose of each position taken by the intervening plaintiffs. They establish the existence of

"malapportionment" in California Senate election districts, on the facts present before us. But they did not require immediate action by this court, for all reiterate the principle that in awarding relief for malapportionment of election districts, a District Court should consider many factors, including the proximity of the forthcoming election, the complexities of the election laws, etc., and above all should rely on general equitable principles.

VII

DIFFUSION OF POLITICAL POWER BETWEEN THINLY AND HEAVILY POPULATED COUNTIES IS NOT PERMISSIBLE

Defendants contend that population is not the only basis for an apportioning of seats in a bicameral legislature; as such, California's so-called "Federal Plan" is constitutionally valid. (*Cal. Const.*, Art. IV, § 6, as amended in 1926). The defendants contend that such was the rule as laid down in *Baker v. Carr, supra. Baker* held only that the petitioners had stated a cause of action, and thus the Supreme Court remanded the cause to the District Court in Tennessee for a hearing on the merits. In *Grey v. Sanders*, 372 U.S. 368 (1963), the court held that the Georgia County Unit System was unconstitutional as it "watered-down" the weight of the votes of certain Georgia voters simply because of their residence. Such discrimination cannot be justified, for the Equal Protection Clause as well as the Fifteenth and Nineteenth Amendments demand "One-Man, One-Vote." Thus it was apparent that the "handwriting was on the wall" with the *Grey* decision, and the pinnacle was reached in the landmark Reapportionment Cases of June 1964.

In considering whether or not the State's legislative apportionment method amounts to an invidious discrimination violative of rights asserted under the Equal Protection Clause, the crucial point is that these rights purportedly violated are individual and personal in nature. *Reynolds v. Sims*, 377 U.S. 533, 561, affirming and remanding 208 F.Supp. 431 (M.D. Ala., 1962). Even though the court's holding may result in a reapportionment of the California State Senate, this court must predominantly concern itself in ascertaining if the plaintiff and others similarly situated have been so invidiously discriminated against as to constitute a prohibited dilution of their constitutionally protected right to vote. The court stated in *Reynolds v. Sims*, *supra*:

> "Legislators are elected by voters, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislators are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." 377 U.S. at 562; *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, reversing and remanding 208 F.Supp. 368 (S.D.N.Y. 1962); *Maryland Committee v. Tawes*, 377 U.S. 656, reversing and remanding 229 Md. 406, 184 A.2d 715; *Davis v. Mann*, 377 U.S. 678, affirming and remanding 213 F.Supp. 577 (E.D. Va. 1962); *Roman v. Sincock*, 377 U.S. 695, affirming and remanding 215 F.Supp. 169 (Del. 1963); *Lucas v. Colorado General Assembly*, 377 U.S. 713, reversing and remanding 219 F.Supp. 922 (Colo. 1963).

In California the Twenty-Eighth Senatorial District, Inyo, Mono and Alpine Counties, had a population of 14,294 according to the 1960 Federal Census, contrasted with the 38th Senatorial District, Los Angeles County, with a population of 6,380,771. The disparity here in favor of the residents of the 28th District is almost 450 to 1. It is invidious discrimination against the residents of Los Angeles County and is debasement of their right to vote and deprives them of the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment. *Reynolds v. Sims, supra.* The votes of the voters of Los Angeles County simply do not count as much as the votes of the voters of Alpine, Mono and Inyo Counties. It takes 450 Los Angeles County voters to equal one vote cast by a voter in the 28th District. In *Maryland Committee v. Tawes, supra,* the ratio was 32 to 1 in the State Senate in the variance of allocation of seats between the most populous and least populous counties, and 12 to 1 in the House. *In Davis v. Mann, supra,* the population variance in the State Senate was 2.65 to 1, and in the House, 4.36 to 1. In *Roman v. Sincock, supra,* the population variance was 15 to 1 for the Senate, and in the House, 35 to 1. Lastly, in *Lucas v. Colorado General Assembly, supra,* the population variance, after the enactment of the Constitutional referendum by the voters in 1962, adopting an apportionment which divided the seats on population and other factors in the State Senate and population in the House, in the Senate was 3.6 to 1 and in the House, 1.7 to 1. In all these cases the court held, in line with the *Reynolds* doctrine of apportionment on a "Substantially-Equal" Population Basis. that they all failed to meet the requisites of this rule and were, therefore, unconstitutional

under the Equal Protection Clause of the Fourteenth Amendment.

The court held in *Wesberry v. Sanders*, 376 U.S. 1: "We do not believe that the framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . ." 376 U.S. 1, at 8. Thus the court held in *Reynolds v. Sims, supra,* that population is the central point for determination and the main basis for judgment in legislative apportionment controversies.

> "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all *places* as well as of all races." 377 U.S. at 568 (Emphasis added.).

Then Chief Justice Warren, writing for the majority, held:

> ". . . as a basic constitutional standard, the Equal Protection Clause requires that seats in a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally im-

> paired where its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568.

Defendants' contention that population is not the only basis for apportioning of seats in the State Senate and that a diffusion of political power between urban and rural areas is permissible cannot be sustained, as such a position is the antithesis of the doctrine which *Reynolds v. Sims, supra,* and all its companion cases have established.

The reliance on *MacDougall v. Green,* 335 U.S. 281, by the defendants is futile in light of *Reynolds v. Sims, supra,* and its companion cases. They have completely misinterpreted *Baker v. Carr, supra,* where the majority in citing *MacDougall* did not give their approval, but rather clearly disapproved it, for the court stated:

> "In MacDougall v. Green, 335 U.S. 281, the District Court dismissed for want of jurisdiction, which had been invoked under 28 U.S.C. §1343(3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. *This Court's* disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit." 369 U.S. at 203. (Emphasis added.)

Clearly, by the Court's own language it has disapproved the earlier *MacDougall v. Green, supra,* holding, for it held that "this Court" disagrees with the earlier holding. Therefore, although not expressly overruled,

MacDougall v. Green, supra, is now obsolete in light of *Baker v. Carr, supra,* and *Reynolds v. Sims, supra.*

California's Senatorial apportionment under Art. IV, § 6, as amended in 1926, is invidiously discriminatory, being based on no constitutionally valid policy; therefore it is invalid under the Equal Protection Clause of the Fourteenth Amendment, since it substantially dilutes one's right to vote solely because of where one happens to reside. *Reynolds v. Sims, supra*; *Maryland Committee v. Tawes, supra*; *Davis v. Mann, supra*; *Roman v. Sincock, supra; WMCA v. Lomenzo, supra;* and *Lucas v. Colorado General Assembly, supra; Paulson v. Meier,* 232 F. Supp. 183 (No. Dak., S.W., July 1964); and *League of Nebraska Municipalities v. Marsh,* 232 F. Supp. 411 (Nebr., July 1964).

Any reliance by the defendants on *Scholle v. Hare,* 367 Mich. 176 (116 N.W. 2d 350), and its subsequent companion cases, under the 1963 Michigan Constitution, Art. IV, §§ 2-6, in 372 Mich. 418 (126 N.W. 2d 731), (see latter case's two supplemental opinions in 372 Mich. 461 (126 N.W. 2d 731) and 128 N.W. 2d 350) is now futile. This is necessarily so, for the Supreme Court in a per curiam decision, 32 U.S.L. Week 3442; 82 S. Ct. 1912; based on *Reynolds v. Sims,* 377 U.S. 533, and *Lucas v. Colorado General Assembly,* 377 U.S. 713, reversed and remanded for further hearings consistent with the *Reynolds'* rule. *Marshall v. Hare,* 227 F. Supp. 989 (E.D. Mich., 1964), the exact same case, which had been instituted in the District Court. The discrepancy in representation in Michigan was about 4 to 1; like all the other reapportionment decisions handed down last June, it, too, was invalid under the *Reynolds'* doctrine.

VIII

AVAILABLE POLITICAL REMEDIES, AS THE INITIATIVE AND REFERENDUM, HAVE NO CONSTITUTIONAL SIGNIFICANCE

Any reliance on the political remedies of initiative and referendum (*Cal. Const.* Art. IV, § 1) has no constitutional relevance. Even though a majority of the electorate may have voted to retain the present apportionment scheme in California under Art. IV, § 6, as amended in 1926, such a vote cannot be sustained, if it deprives others of the Equal Protection of the Laws under the Fourteenth Amendment. *Reynolds v. Sims, supra,* and *Lucas v. Colorado General Assembly, supra.* The Court in *Lucas v. Colorado General Assembly, supra,* was explicit on this point:

> ". . . While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum, individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged mailapportionment, which the individual voters seek, might be achieved. An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular re-

> ferendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so. We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds v. Sims*. And we conclude that the fact that a paracticably available political remedy, such as initiative and referendum exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State's voters at the next election." 377 U.S. at 736-737.

Therefore, it is clear that the mere fact that California voters have consistently rejected any reapportionment of the State Senate on a population basis by the initiative process in the elections of 1928, 1948, 1960 and 1962 is immaterial. The rejection cannot be immune from constitutional attack on the ground that it violates the plaintiff's and all others similarly situated right to vote without having such right being substantially diluted by the mere fact of their residence, which is in direct violation of the rights guaranteed under the Fourteenth Amendment. *Reynolds v. Sims, supra,* and *Lucas v. Colorado General Assembly, supra.*

IX

CAN CALIFORNIA'S GREAT DIVERSITY OF PEOPLES, RESOURCES, INTEREST AND ACTIVITIES OVERRIDE THE EQUAL PROTECTION PRINCIPLE?

It is the position of the defendants that California's apportionment of its State Senate (Art. IV, § 6, as amended in 1926) is constitutionally rational in light of the State's size, diversity, interests and activities. This argument had it been made prior to *Baker v. Carr, supra,* and its progeny, would have been highly persuasive. But these other factors cannot be sustained where the deviation is so clearly invidious, as is the case here in California (almost 450 to 1 in two districts). *Reynolds v. Sims, supra; Lucas v. Colorado General Assembly, supra; Davis v. Mann, supra; Roman v. Sincock, supra; Maryland Committee v. Tawes, supra;* and *WMCA v. Lomenzo, supra.* The rule laid down in *Reynolds* and its companion cases will allow for a slight deviation from the "Substantially Equal Population" Doctrine, where such is incident to the effectuation of a rational state policy. The Court in *Reynolds v. Sims, supra,* held:

> ". . . neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from

> population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." 377 U.S. at 579-580.

Thus any reliance on California's large area, diverse interests, history, sectional differences, that districts would be too large in area, and the like, are immaterial, since California's State Senate is strictly apportioned on an area basis (Art. IV, § 6, as amended in 1926) without any consideration to the substantially-equal population doctrine by *Reynolds v. Sims, supra,* and its companion cases.

X

FEDERAL SCHEME ANALOGY

Furthermore, defendants contend that the present apportionment of the California State Senate (Art. IV, § 6, as amended 1926) can, nevertheless, be sustained because it is patterned after the Federal Congress. Factually, the similarity is clear, for in California the Assembly is apportioned strictly on a population basis (*Cal. Const.* Art. IV, § 6), analogous to the House of Representatives (U.S.C., *Const. Art.* I, § 2, cl. 3), whereas, the State Senate, being apportioned on an area basis with no more than one Senator for each county, is analogous to the United States Senate, where each State is entitled to two Senators regardless of population (Seventeenth Amendment of the U.S. Constitution). But, legally, this analogy is inapposite and irrelevant to

State Legislative Districting schemes. The Court in *Reynolds v. Sims, supra,* adopted the opinion of the lower court on this matter, which had held that the Alabama counties were merely involuntary political units of the State created by statute to aid in the administration of the State Government. *Sims v. Reynolds,* 208 F.Supp. 431 (M. D. Ala. 1961). The Court held that the federal analogy argument is generally the last hope when it is clear that a state's apportionment is, as is California's, invidiously maladjusted. The Supreme Court holds our Founding Fathers did not intend to establish any pattern for state legislative apportionment when the representation in the Federal Congress was adopted. *Reynolds v. Sims, supra; Maryland Committee v. Tawes, supra; Roman v. Sincock, supra; Davis v. Mann, supra;* and *Lucas v. Colorado General Assembly, supra.* The Court in *Reynolds* proceeded:

> ". . . The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller states on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation . . .
>
> Political subdivisions of States—Counties, cities, or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate govern-

mental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . . The relationship of the States to the Federal Government could hardly be less analogous." 377 U.S. at 574-575.

Defendant makes further mention that the different basis of apportionment in the California Legislature is necessary to maintain the proper checks and balances between the two houses of the legislature, as is the case in the Federal Congress. This again might be a forceful argument were this a case of first impression, but this argument is of no avail in light of the Court's holding that the Federal Analogy is inapposite and irrelevant to state legislative schemes. This is seen from the Court's holding in *Reynolds:*

"We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same — population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made

to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequalities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis." 377 U.S. at 576-577.

XI

CONCLUSION

The present plan of Senate apportionment by districts in California is unconstitutional, being an invidious discrimination of citizens' rights and violative of the Equal Protection Clause of the XIV Amendment to the United States Constitution, as interpreted and determined by the Supreme Court of the United States.

XII

RELIEF

Equitable principles must guide this court in whatever relief it determines is just and appropriate under the circumstances of this case. (*Baker v. Carr, supra; Reynolds v. Sims, supra.*)

This court asserts and agrees that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a

timely fashion after having had an adequate opportunity to do so." *Reynolds v. Sims, supra* at 586.

At the same time, this court feels required to state (as a three-judge court in this circuit has heretofore said with respect to reapportionment of both houses of the State Legislature of the State of Washington):

> "In the legal climate of today, no citizen may acquire a right to a legal status created by an unremitting legislative disregard of sacred constitutional rights." *Thignen v. Meyers,* 211 F. Supp. 826 (1962).

If the California State Legislature once ordered fails to act, and to act with promptness, we, ever conscious of our oath to uphold the Constitution of the United States, will unhesitatingly take appropriate action to correct the inequity.

This court, having determined that the primary objective of any order or degree at this time should be to effectively induce the 1965 session of the California State Legislature *to properly reapportion itself as its first order of business,* makes no order at this time other than the following:

(1) It is the order of this court that the California State Legislature reapportion the California State Senate consistent with this opinion, and the several existing United States Supreme Court decisions on the subject, so that the *Reynolds'* doctrine of "districts of substantial equality in population" exists.

(2) Should the California State Legislature fail to discharge its duty to fairly, adequately and validly redistrict State Senatorial Districts within the State of California, by not later than July 1, 1965, this court

will, before or after that date, hold further hearings, or motions; devise redistricting plans; and make such further orders or take such further steps as may be necessary or appropriate (either upon its own motion, or on the motion of any party or intervenor), and to that end we retain full jurisdiction of this case for such purpose, and all others.

Stanley N. Barnes
Judge, U.S. Court of Appeals

M. D. Crocker
Judge, U.S. District Court

I dissent, and reserve the right to subsequently file a dissenting opinion.

Charles H. Carr
Judge, U.S. District Court.

APPENDIX "B."

Earlier Opinion of the Court Below.

We hold this Court has jurisdiction (*Baker v. Carr*, 369 U.S. 204-208) and that the subject matter of this suit is justiciable, *i.e.*, this is *not* a non-justiciable political question. (*Baker v. Carr, supra*, pp. 208-236, particularly, tests, p. 217). This means plaintiff is entitled to raise questions under the equal protection clause of the Fourteenth Amendment, as to the California apportionment statutes.

This does not mean plaintiff is entitled to a preliminary injunction, or any injunction *pendente lite*. As Mr. Justice Potter Stewart stated in staying the effect of the second Michigan Supreme Court decision of July 18, 1962, in *Scholle v. Hare* (*i.e.*, after the remand of April 23, 1962, and on July 27, 1962): "The issues decided by the Michigan Supreme Court are very new, and not the same as those decided in *Baker v. Carr*," *supra*. (*Scholle v. Hare*, 1960, 360 Mich. 1, 104 N.W. 63; 369 U.S. 429.) See also, *W.M.C.A. v. Simon*, 202 F. Supp. 741 (1962), 370 U.S. 190; and the second opinion of August 16, 1962, after remand, dismissing the complaint on its merits; also; *Sims v. Frink*, D.C.Ala. 1962, 205 F. Supp. 245 (April 16, 1962); *Sanders v. Gray*, N.D.Ga., 203 F. Supp. 158 (April 28, 1962); *Toombs v. Fontson*, D.C.Ga., 205 F. Supp. 248 (May 25, 1962); *Lein v. Sathra*, D.C.N.D., 205 F. Supp. 536 (May 31, 1962); *Baker v. Carr*, D.C. Tenn., ... F.Supp. .... (June 22, 1962); *Maryland Committee v. Tawes* (July 23, 1962; 31 U.S. Law Week 2069); *Caesar v. Williams*, D.C.Idaho, ... F.Supp. .... (April 3, 1962).

Federal courts should not lightly presume to exercise supervision over State election qualifications upon the

theory they are unconstitutional. Any alleged violation must be clearly proved. The burden of proof on that issue rests on plaintiff, and every intendment must be resolved in favor of constitutionality. The facts thus far disclosed in this case show a marked difference from those in *Baker v. Carr*, particularly with respect to the possibility of the existence of a State political remedy.

We decline to grant plaintiff's motion for a preliminary injunction, and hereby deny such motion.

The motion to dismiss upon ground (1) failure to state a claim is denied; the motion to dismiss upon grounds (2), (3) and (4) (for want of equity, abstention to permit State political remedy, and failure to join indispensable parties) is denied without prejudice. The motion to dismiss on ground (5) is rendered moot by our refusal to grant plaintiff's motion for a preliminary injunction, and our determination that the action is to be heard on its merits.

All appearing defendants are ordered to file an appropriate answer on or before September 14, 1962.

All appearing parties are requested to prepare a stipulated statement of facts and file the same on or before September 14, 1962.

The motion to dismiss as to Benjamin S. Hite, Registrar of Voters of the County of Los Angeles, is at this time denied without prejudice.

Stanley N. Barnes
United States Circuit Judge

Myron D. Crocker
United States District Judge

Charles H. Carr
United States District Judge.

Dated: August 20th 1962
Los Angeles, California

APPENDIX "C."

Constitution of California.

Art. IV, Sec. 6

SEC. 6. For the purpose of choosing members of the Legislature, the State shall be divided into 40 Senatorial and 80 Assembly districts to be called Senatorial and Assembly districts. Such districts shall be composed of contiguous territory, and Assembly districts shall be as nearly equal in population as may be. Each Senatorial district shall choose one Senator and each Assembly district shall choose one member of Assembly. The Senatorial districts shall be numbered from one to 40, inclusive, in numerical order, and the Assembly districts shall be numbered from one to 80 in the same order, commencing at the northern boundary of the State and ending at the southern boundary thereof. In the formation of Assembly districts no county, or city and county, shall be divided, unless it contains sufficient population within itself to form two or more districts, and in the formation of Senatorial districts no county, or city and county, shall be divided, nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any Assembly or Senatorial district. The census taken under the direction of the Congress of the United States in the year 1920, and every 10 years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first regular session following the adoption of this section and thereafter at the first regular session following each decennial Federal census, adjust such districts, and reapportion the representation so as to preserve the

Assembly districts as nearly equal in population as may be; but in the formation of Senatorial districts no county or city and county shall contain more than one Senatorial district, and the counties of small population shall be grouped in districts of not to exceed three counties in any one Senatorial district; provided, however, that should the Legislature at the first regular session following the adoption of this section or at the first regular session following any decennial Federal census fail to reapportion the Assembly and Senatorial districts, a Reapportionment Commission, which is hereby created, consisting of the Lieutenant Governor, who shall be chairman, and the Attorney General, State Controller, Secretary of State and State Superintendent of Public Instruction, shall forthwith apportion such districts in accordance with the provisions of this section and such apportionment of said districts shall be immediately effective the same as if the act of said Reapportionment Commission were an act of the Legislature, subject, however, to the same provisions of referendum as apply to the acts of the Legislature.

Each subsequent reapportionment shall carry out these provisions and shall be based upon the last preceding Federal census. But in making such adjustments no persons who are not eligible to become citizens of the United States, under the naturalization laws, shall be counted as forming a part of the population of any district. Until such districting as herein provided for shall be made, Senators and Assemblymen shall be elected by the districts according to the apportionment now provided for by law.

APPENDIX "D."

California Elections Code, Sec. 30100.

30100. The State is divided into 40 senatorial districts, which shall be designated and constituted as follows:

1. The Counties of Modoc, Lassen and Plumas shall constitute the First Senatorial District.

2. The Counties of Del Norte and Siskiyou shall constitute the Second Senatorial District.

3. The County of Humboldt shall constitute the Third Senatorial District.

4. The Counties of Mendocino and Lake shall constitute the Fourth Senatorial District.

5. The Counties of Trinity and Shasta shall constitute the Fifth Senatorial District.

6. The County of Butte shall constitute the Sixth Senatorial District.

7. The Counties of Sierra, Nevada and Placer shall constitute the Seventh Senatorial District.

8. The Counties of Tehama, Glenn and Colusa shall constitute the Eighth Senatorial District.

9. The Counties of El Dorado and Amador shall constitute the Ninth Senatorial District.

10. The Counties of Yuba and Sutter shall constitute the 10th Senatorial District.

11. The Counties of Napa and Yolo shall constitute the 11th Senatorial District.

12. The County of Sonoma shall constitute the 13th Senatorial District.

13. The County of Marin shall constitute the 13th Senatorial District.

14. The City and County of San Francisco shall constitute the 14th Senatorial District.

15. The County of Solano shall constitute the 15th Senatorial District.

16. The County of Alameda shall constitute the 16th Senatorial District.

17. The County of Contra Costa shall constitute the 17th Senatorial District.

18. The County of Santa Clara shall constitute the 18th Senatorial District.

19. The County of Sacramento shall constitute the 19th Senatorial District.

20. The County of San Joaquin shall constitute the 20th Senatorial District.

21. The County of San Mateo shall constitute the 21st Senatorial District.

22. The County of Stanislaus shall constitute the 22d Senatorial District.

23. The Counties of Santa Cruz and San Benito shall constitute the 23d Senatorial District.

24. The Counties of Merced and Madera shall constitute the 24th Senatorial District.

25. The County of Monterey shall constitute the 25th Senatorial District.

26. The Counties of Tuolumne, Mariposa and Calaveras shall constitute the 26th Senatorial District.

27. The County of Kings shall constitute the 27th Senatorial District.

28. The Counties of Alpine, Mono and Inyo shall constitute the 28th Senatorial District.

29. The County of San Luis Obispo shall constitute the 29th Senatorial District.

30. The County of Fresno shall constitute the 30th Senatorial District.

31. The County of Santa Barbara shall constitute the 31st Senatorial District.

32. The County of Tulare shall constitute the 32d Senatorial District.

33. The County of Ventura shall constitute the 33d Senatorial District.

34. The County of Kern shall constitute the 34th Senatorial District.

35. The County of Orange shall constitute the 35th Senatorial District.

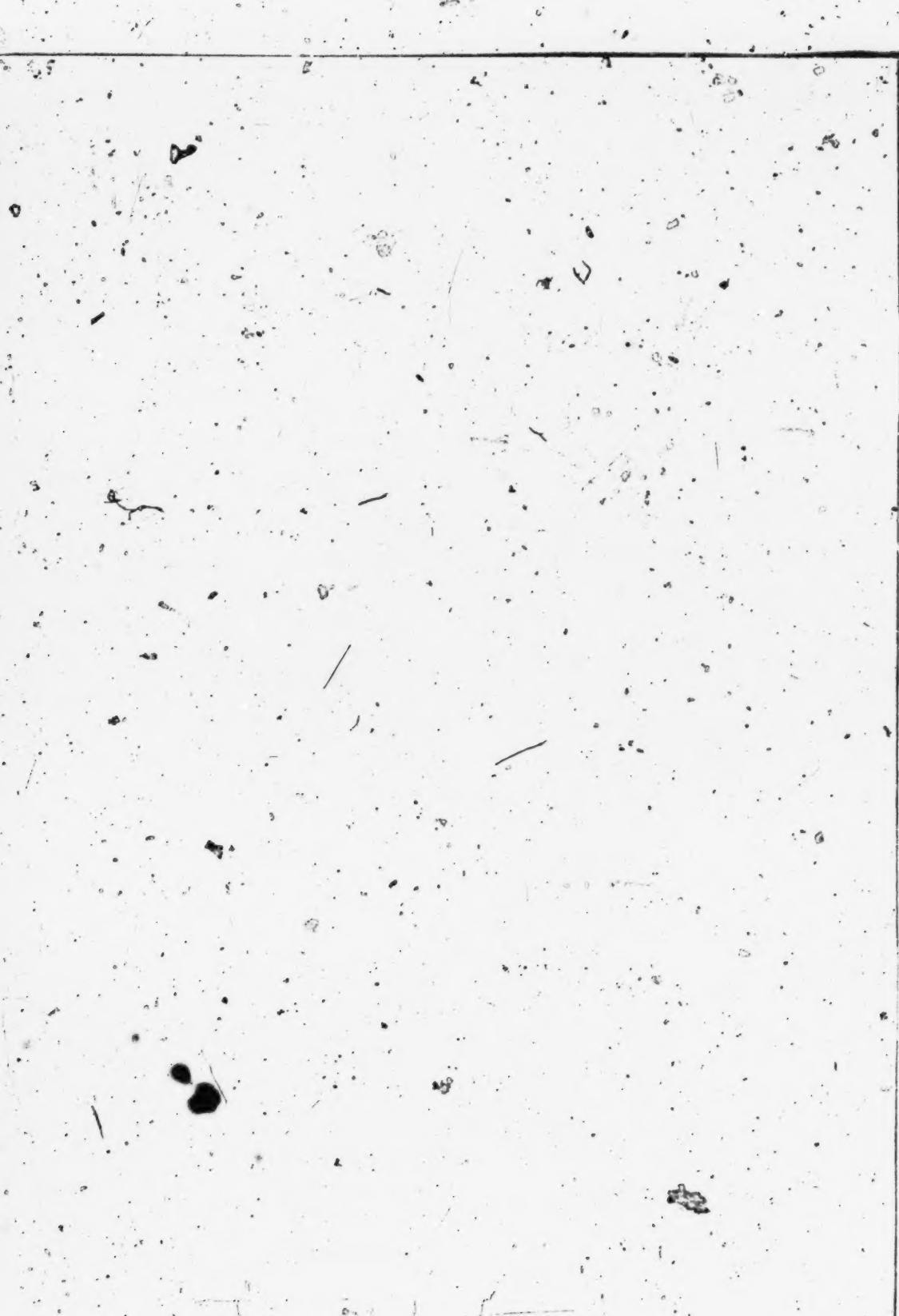
36. The County of San Bernardino shall constitute the 36th Senatorial District.

37. The County of Riverside shall constitute the 37th Senatorial District.

38. The County of Los Angeles shall constitute the 38th Senatorial District.

39. The County of Imperial shall constitute the 39th Senatorial District.

40. The County of San Diego shall constitute the 40th Senatorial District.



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IN THE

Supreme Court of the United States

October Term, 1964

No. 935

FRANK M. JORDAN, as Secretary of State of the State of California, EDMUND G. BROWN, as Governor of the State of California, THOMAS C. LYNCH, as Attorney General of the State of California, and THE SENATE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA,

Appellants,

vs.

PHILL SILVER,

Appellee.

MOTION TO DISMISS OR AFFIRM.

Apellee in the above-entitled case moves to dismiss or affirm on the grounds that it is manifest that the question presented is so unsubstantial as not to require further argument.

/s/ Phill Silver
Appellee In Prose

Opinion Below: The opinion of the Court below is not reported. It is printed in Appendix A, in the statement as to jurisdiction and an earlier opinion in the same case. (Appendix B)

Jurisdiction: The jurisdictional requisites are set forth in the jurisdictional statement. (J.S. pages 1, 2

and 3.) The cases relied upon to establish the substantiality of the questions presented by this Appeal is either not pertinent or are distinguishable and support the Appellee.

Question Presented.

1. Did the District Court correctly determine that equal protection of the law was denied a citizen and elector of the most heavily populated county of the State of California by that state's constitutional and statutory provisions for a legislature of two houses, one of which was, and the other of which was not, required to be apportioned in accordance with population; and, on that account, ordering the legislature of the state, within the time fixed in the order, to reapportion the latter house on a population basis, in default of which the court would itself effect such a reapportionment.

Constitutional Provisions Involved.

The provisions of the constitution of the United States and of the constitution of California involved in this appeal are set forth in Appendix C of the jurisdictional statement.

Statement of the Case.

This is a class action brought by a citizen of the United States and of California and as an elector and registered voter of Los Angeles County, on his own behalf and on behalf of all other citizens, electors and registered voters of the State of California similarly situated.

The challenge was made that the provisions of Article IV, Section 6, of the California Constitution as colorably

amended in 1926, violate the Fourteenth Amendment of the Constitution of the United States in that the apportionment formula contained therein has resulted when applied to the population figures of the State of California, in a grossly unfair representation in the California Senate in favor of the lesser populated rural areas of the state, to the great disadvantage of the citizens residing in the densely populated urban centers of the state.

It was alleged that plaintiff's vote and right of representation in the California Senate is but 1/450th of those voting in the 28th Senatorial District. It was further alleged that as a result of the Constitutional Provisions challenged, to wit: Article IV, Section 6, California Constitution, the votes of the plaintiff and of all of the persons for whose benefit this action has been brought, are not as effective in the California Senate as the votes of other citizens residing in rural areas of the State. That the plaintiff and all other citizens similarly situated are suffering a debasement of their vote by virtue of the arbitrary, obsolete, and unconstitutional apportionment of the Senate and they, and all other similarly situated citizens are denied the equal protection of the law required by the Fourteenth Amendment of the United States Constitution.

The court below, following the receipt of documentary evidence and stipulated sets of facts, held that the present plan of Senate Apportionment in California is unconstitutional being an invidious discrimination of citizens rights and violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution as interpreted and determined by the Supreme Court of the United States.

The court granted the following relief:

That the California State Legislature properly reapportion itself as its first order of business in the 1965 Session, consistent with the opinion of the court and the existing United States Supreme Court decisions on the subject, so that the Reynold's Doctrine of "Districts of Substantial Equality in Population" exist.

That should the California State Legislature fail to discharge its duty fairly, adequately, and validly, redistrict State Senatorial Districts within the State of California, by not later than July 1, 1965, that the court will before or after that date, hold further hearings, or motions; devise re-districting plans; and make such further orders or take such further steps as may be necessary or appropriate, either upon its own motion, or on the motion of any party or intervenor, and to that end retain full jurisdiction of the matter.

California Apportionment When Suit Was Brought.

The provisions apportioning the state senate (Article IV, Section 6, of the California Constitution), as it existed at the time the suit was brought, divided California into forty Senatorial Districts. Each Senatorial district was to choose one senator. This apportionment was the result of the adoption of an initiative measure in 1926. The provisions provided further that no county was to have more than one representative in the Senate and no senator was to represent more than three counties. The court below took judicial knowledge of the population disparities which existed in the present apportionment of seats in the California State Senate. For example, according to the Federal Census of 1960, the population of the 38th Senatorial District

comprising Los Angeles County, was 6,390,771. The population of the 28th Senatorial District comprising Mono, Inyo and Alpine Counties was 14,294. This was a ratio of almost 450 to 1.

Other disparities exist with respect to other Senatorial Districts. The 40th Senatorial District, San Diego County, 100 to 1, as compared to District 28. The 16th Senatorial District, Alameda County, 90 to 1, as compared to District 28. The 14th Senatorial District, San Francisco County, 60 to 1, as compared to District 28; the 35th Senatorial District, Orange County, 50 to 1, as compared to District 28.

The court below rejected the defendants' contention that population is not the only basis for apportioning of seats in the State Senate and that a diffusion of political power between urban and rural areas should be permissible.

And the court below concluded that California's Senatorial Apportionment under Article IV, Section 6, as amended in 1926, is invidiously discriminately, being based on no constitutionally valid policy; that therefore, it was invalid under the equal protection clause of the Fourteenth Amendment, since it substantially diluted one's right to vote solely because of where one happens to reside.

The Opinion Below: The court below found that any reliance on the political remedies of initiative and referendum available had no constitutional relevance. That even though a majority of the electorate may have voted to retain the present apportionment scheme in California, under Article IV, Section 6, as amended in 1926, such a vote could not be sustained if it deprived others of the equal protection of the laws under the

Fourteenth Amendment. Additionally, the court concluded that any reliance on California's large area, diverse interest, history, section of differences, and the argument the districts would be too large in area, were immaterial. That the California State Senate is strictly apportioned on an area basis, without any consideration to the substantially equal population doctrine of *Reynolds v. Sims*, and its companion cases.

A Motion to Dismiss or Affirm May Be Made on the Ground That "It Is Manifest That the Questions on Which the Decision of the Cause Depends Are so Unsubstantial as Not to Need Further Argument".

Motions to dismiss or affirm are governed by Rule 16 of this Court. Section 1(c) provides that this court will receive such a motion on the ground that "It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee moves that the per curiam order of the District Court be affirmed or the appeal be dismissed on the following ground:

(1) That the questions presented are so unsubstantial as not to warrant further argument.

Summary of Argument.

On March 26, 1962, the United States Supreme Court held that a justiciable Federal Constitutional Cause of Action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification. (*Baker v. Carr*, 369 U.S. 186).

Thus, the United States Supreme Court, in a decision of first impression of that court established a new Federal judicial precedent that questions of territorial discrimination and apportionment of state legislatures are questions which must be decided by the courts.

On April 23, 1962, the United States Supreme Court, in reversing a decision rendered by the Michigan Supreme Court, declared that the equal protection claim presented by the voters in that case was enforceable in the Courts of that State. (*Scholle v. Hare*, 8 Law. Ed. 2d 1, 369 U.S. 429).

In 1962, a class action was filed in a Los Angeles Federal Court on behalf of the citizens and qualified voters of the County of Los Angeles, making the claim that the Fourteenth Amendment to the United States Constitution requires both houses of the California Legislature to be apportioned on the basis of population. The complaint alleged that the method of apportionment set forth in the California Constitution (Art. IV, Sec. 6) was unconstitutional under the equal protection clause of the United States Constitution.

The complaint states that the method of representation that existed in the State of California when applied to the population figures of the state resulted in a grossly unfair weighting of both houses of the State

Legislature in favor of the less populated areas to the great disadvantage of the densely populated urban centers of the state.

It was further alleged that the Citizens of the heavy populated areas were being subjected to taxation without representation, and that the California apportionment formula was contrary to the prevailing philosophy of government in the United States and all Anglo-Saxon jurisdictions.

The relief sought in the complaint was a declaration by the Federal Court that the 1926 Amendment to the California State Senate consistent with the Court's opintive.

The three judge court in this case (2-1) ordered that the California State legislature reapportion the California State Senate consistent with the court's opinion and the existing Supreme Court decisions so that the Reynold's doctrine of "districts of substantial equality in population" exists.

In the following cases among others this court has held *inter alia* that both houses of a bicameral state legislature must be apportioned substantially on a population basis. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; *WMCA, Inc. v. Lomenzo*, 377 U. S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed. 2d 595; *Davis v. Mann*, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609; *Roman v. Sincock*, 377 U.S. 695, 84 S.Ct. 1449, 12 L. Ed.2d 620, and *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632.

Appellants seek to distinguish this case from the cases heretofore decided by this court on the following alleged grounds:

(1) The challenged apportionment was freely adopted by an electorate having a clear cut choice between it and one based on population. (Juris Statement p. 14)

(2) That this court has not passed upon a legislation apportionment that the people of a state, the majority of whom live and vote in the populous centers of the state, have repeatedly voted to adopt and retain. (Juris St. p. 15.)

(3) That a constitutional right to vote may be waived. (Juris St. p. 15.)

(4) Every case has to be considered on its own facts and in relation to the conditions existing in the state from which the case comes. (Juris St. p. 16.)

(5) The minority should be protected against the excesses of the majority. — Different interests exist in different classes of citizens.

(6) That California's unique factual situation and the particular history of the adoption of its system of legislative apportionment provide the basis of a classification resting on rational grounds. (Juris St. p. 17.)

(7) A bicameral legislature composed of a popular and a geographical house in order to diffuse political initiative is not an irrational plan. (Juris St. p. 17.)

(8) It is a substantial question whether the purpose to provide a (bicameral) check and balance is an invidious discrimination against those who have the power to control all else if the State's government and ultimately to write their wishes into law. . . . The decisions so far rendered by this court do not necessarily foreclose this question beyond the possibility of rational differentiation. (Juris St. p. 18.)

(9) Compliance with the order of the court below is virtually impossible in California without disregard by the State legislature of the provisions of the State Constitution that fix the size of the Senate at 40 members, and require that they be elected from districts in the formation of which no county may be divided nor any part of a county united with another. (Cal. Const. Art. IV, Sec. 6) That it is a question of considerable substantiality whether in apportioning on the basis prescribed by the court below the California legislature may disregard and if so to what extent, those provisions of the State Constitution. (Juris St. p. 19.)

(10) Similar provisions in the Constitution of Colorado have been held to preclude validity of a reapportionment statute violating them, notwithstanding determination by a United States District Court [*Lucas v. Forty-Fourth General Assembly D. Colo.*, 232 F. Supp. 797] that the statute was offensive to the Equal Protection Clause [*White v. Anderson* (Colo. 1964), 394 P. 2d 333, 335]. This court seemingly has approved that approach, as it vacated part of the judgment in

Lucas for further consideration in the light of White. [*Forty-Fourth General Assembly v. Lucas* (Feb. 1, 1965)] 379 U.S. .... (Juris St. p. 19.)

(11) Without guide lines from the courts, it is not unlikely that a Constitutional Amendment will be needed [*White v. Anderson,* 394 P. 2d 333]. (Juris St. pp. 20-21.)

(12) A legislature ordered to do that which cannot be accomplished without violating the organic law of its State, ought to be told what it may lawfully do, or given an opportunity to get the answer from the State Courts. (*Yorty v. Anderson,* 60 Cal. 2d 312, 317, 384 P. 2d 417, 420, 33 Cal. Rptr. 97-100 (Juris St. p. 21).)

(13) The question whether in default of legislative reapportionment a Federal Court will carry on the process by itself is one that has not been foreclosed or obviated by *Reynolds v. Sims,* 377 U.S. 533 and it is one "which should be determined only after the fullest plenary and most deliberate consideration in the part of this Court." (Juris St. pp. 21-22.)

The Decision of the Three Judge Court Was Clearly Correct.

The three-judge Federal Court relying upon *Reynolds v. Sims,* 377 U.S. 533, concluded:

"California's Senatorial Apportionment under Article IV, Section 6, as amended in 1926, is invidiously discriminatory, being based on no constitutionally valid policy; therefore, it is invalid under the equal protection clause of the 14th amend-

ment, since it substantially dilutes one's right to vote, solely because of where one happens to reside."

The three judge court rejected the argument made to it that a majority of the electorate had voted to retain the present apportionment scheme in California under Article IV, Section 6, as amended in 1926, stating, * * *

"It is clear that the mere fact that California voters have consistently rejected any reapportionment of the State Senate on a population basis by the initiative process in the elections of 1928, 1948, 1960, and 1962, is immaterial."

Exact numerical equality of population among legislative districts is not required by the equal protection clause of the 14th Amendment to the United States Constitution. However, it is clear in the *Baker v. Carr* case, 369 U. S. 187, 7 L. Ed. 2d 663 (1962), that a voter is deprived of his right to have equal protection of the laws if the number of voters in his legislative district is unreasonably and irrationally large.

Reply to Appellants' Argument That the Challenged Apportionment Was Freely Adopted by an Electorate Having a Clear Cut Choice Between It and One Based on Population.

In *Lucas v. Colorado General Assembly*, 377 U.S. 713, 730 the Colorado scheme of apportionment attacked before the Supreme Court was one adopted by a majority vote of the Colorado electorate almost contemporaneously with the District Court's decision on the merits.

The Supreme Court rejected the argument that the Colorado voters had made a definite choice between

two contrasting alternatives, or that they had indicated that "minority process in the Senate is what they want." (*Id.* p. 732.)

The Supreme Court further concluded, "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a states electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause".

The court added, "Manifestly the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act."

Reply to Appellants' Argument That Compliance With the Order of the Court Below Is Virtually Impossible Without Disregard by the State Legislature of the Provisions of the State Constitution.

Appellant argues that compliance with the order of the court below is virtually impossible because of the provisions of the State Constitution that fix the size of the Senate at 40 members, and require that they be elected from districts in the formation of which no county may be divided nor any part of a county united with another. (Calif. Const. Art. IV, Sec. 6.)

Appellant presents this issue as if it were a question of first impression.

The courts have repeatedly upheld the right to declare unconstitutional a State Constitutional provision which conflicts with the Federal Constitution:

American Federation of Labor v. Watson, 327 U.S. 582, 592, 66 S. Ct. 761, 90 L. Ed. 873;

Davis v. McCarty, 388 P. 2d 480 (S. Ct. Okla., Jan. 1964);

Butcher v. Bloom, 203 A. 2d 556 (S. Ct. Penn., Sept. 1964);

Lucas v. Colorado General Assembly, 377 U.S. 713;

W.M.C.A. v. Lomenzo, 377 U.S. 633;

Maryland v. Tawes, 377 U.S. 656;

Roman v. Sincock, 377 U.S. 695;

White v. Anderson, 394 P. 2d 333 (S. Ct., Colo., July, 1964);

Sweeney v. Notte, 183 A. 2d 296 (Rhode Island, 1962);

Scholle v. Hare, 116 N.W. 2d 350, 367 Mich. 176.

Since *Baker v. Carr,* the Supreme Law of the Land is that such gross inequity as exists under the present apportionment statute of the State of California is violative of the Fourteenth Amendment of the United States Constitution.

As Mr. Justice Douglas stated in *Gray v. Sanders,* 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963):

> "As we stated in *Gomillion v. Lightfoot,* 364 U.S. P. 347, 'When a state exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'"

The answer to the question presented by the Appellant herein is found in *Scholle v. Hare,* 369 U.S. 429,

8 L. Ed. 2d 1, where this court remanded the case "for further consideration" in the light of *Baker v. Carr.*

This court stated that the issue was settled by *Baker v. Carr.* It is to be seen from the foregoing that Appellants question is without merit. Where the ratio in population of Senatorial districts is as high as 420 to 1, Appellant cannot be heard to say that the voters in the more populous senatorial districts have not been deprived of the equal protection of the laws.

Reply to Argument That a Constitutional Right to Vote May Be Waived.

Appellant argues that the right to vote is a personal one and therefore may be waived.

The issue of waiver is not relevant. The right to complain of impairment rests with every voter discriminated against. Even a voter who may have for lack of better judgment or knowledge voted to continue a method of representation that deprived other voters similarly situated would not be a bar to judicial relief under the Equal Protection Clause. Thus the Supreme Court in *Reynolds v. Sims* said: ". . . the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.

In *Lucas v. Colorado General Assembly,* 377 U.S. 713, 737 the Supreme Court similarly said, "A citizen's constitutional rights can hardly be impinged simply because a majority of the people choose that it be."

Reply to Appellants' Argument That Similar Provisions in the Constitution of Colorado Have Been Held to Preclude Validity of an Apportionment Statute Violating Them Notwithstanding That a Determination by a United States District Court That the Statute Was Offensive to the Equal Protection Clause.

Appellant attempts to draw an analogy from the case of *White v. Anderson.*

In *White v. Anderson,* 394 P. 2d 333, the Colorado Supreme Court held that a reapportionment statute dividing the counties to form senatorial districts was violative of the State Constitution.

The court further held that it was not foreclosed from passing on the validity of the Act by reason of a decree entered by a Three Judge Federal Court.

The Supreme Court concluded that until the citizens of the State amended the Constitution so as to permit such division neither the legislature nor the courts can do it for them.

The court however in upholding the constitutional provision which prohibited counties from being divided in the formation of senatorial districts nevertheless made a further order staying the effect of the judgment nullifying the reapportionment Act until the session of the Legislature to be held in 1965.

Article IV, Section 6 of the California Constitution provides that no county, or city and county shall be divided, nor shall a part of any county, or of any city and county be united with any other county or city and county in forming either an assembly or senatorial district. It also provides that *each senatorial district shall*

choose only one senator, and that no county shall contain more than one senatorial district.

The Colorado Act did *not* limit the counties to one senator, but made provision contrary to the State Constitution for a division of the counties into additional senatorial districts.

Thus in the *Colorado* case there was an opportunity to comply with the Equal Protection Clause without violating the State Constitutional provision forbidding the counties to be divided. This court as well as numerous State Supreme Courts have repeatedly now held that constitutional provisions limiting the number of legislators to no more than one to a county of other political subdivision must face the test of the Equal Protection Clause.

The Three Judge Court below held that the California method of representation under Article IV, Section 6 as amended in 1926 was invidiously discriminatory and invalid under the Fourteenth Amendment.

In rendering this decision the Three Judge Court followed the precedents established by this Court.

The reliance attempted by the Appellant on *White v. Anderson,* is just as futile as was the reliance asserted on *Scholle v. Hare,* 367 Mich. 176 116 N.W. 2d 350.

In *Marshal v. Hare,* 227 Fed. Supp. 989 (1964). the new constitution adopted by the voters was challenged under the Fourteenth Amendment on the ground it authorized a disparity of population of the senatorial districts. The Court below dismissed the suit. This Court reversed, 378 U.S. 561.

In *Germano v. Werner*, 220 F. Supp. 230 (1963). The lower court dismissed a complaint challenging the reapportionment of senatorial districts. The court upheld the constitutional provision which, in turn, had created certain senatorial districts based on a geographical basis.

This court reversed the judgment of dismissal, 378 U.S. 560. A similar reversal was made on the same grounds as to *Hearne v. Smylie*, 378 U.S. 563.

In *Davis v. Synhorst*, 225 F. Supp. 689 (Jan. 1964) the lower court held that the Constitutional Amendments dealing with apportionment were invalid. This court affirmed the judgment. 378 U.S. 565, June 22, 1964.

In *Petusky v. Clyde*, 234 F. Supp. 960 (Sept. 1964) a three judge court held that the provisions of the Utah Constitution requiring that each county have at least one member in the House of Representatives was in irreconcilable conflict with the Federal Constitution.

The provisions of the Utah Constitution are identical with the California Constitution, *i.e.*, no county shall be divided, and no part of a county was to be united with another county in the formation of a senatorial district.

The Utah Constitution also provided that each county shall be entitled to at least one representative. The court concluded that the Reapportionment Act of 1963 based on the Utah Constitution was "federally unconstitutional."

To the same effect is *Butterworth v. Dempsey*, 229 F. Supp. 754 (Feb. 1964), affirmed 378 U.S. 562 (June 1964).

The Motion to Take Judicial Notice of a Superior Court Case Filed by the Senate.

Despite the fact that the Senate intervened in this case, participated in the argument on the merits and are now before this court on appeal, the Senate as a diversionary and delaying tactic has filed a suit in the Superior Court of Sacramento County.

The senate disregarding the terms of the *per curiam* order of the three judge court seek to evade their duty to comply with the mandate of the court to reapportion prior to July 1, 1965.

The three judge court specifically decreed that jurisdiction was retained to permit any of the parties to make any motion for the holding of further hearings, or to devise redistricting plans.

The Appellants now ask this court to assist them in flaunting the *per curiam* order by granting their motion and petition.

The California Supreme Court has refused to accept jurisdiction in companion cases filed by other voters on three separate occasions. It is unlikely that the California Supreme Court would accept jurisdiction after the three judge Federal Court has rendered a decree on the merits.

It is further unlikely that the Superior Court will retain jurisdiction under these circumstances (*Pacific Electric Ry. v. Dewey*, 95 Cal. App. 2d 69.)

In *State v. Meier*, 127 N.W. 2d 665 (S. Ct. N. Dakota, April 1964) after a Federal Court had rendered a decree declaring a reapportionment law to be unconstitutional, the Plaintiffs filed a petition with the State Supreme Court. The Plaintiffs asked the State

Supreme Court to take original jurisdiction. The Plaintiffs further alleged they were following the directions of the Federal Court.

In denying the Petition the Supreme Court said, "We employ the doctrine of Comity—the Court that first acquires jurisdiction of the question retains it, which in this case is the United States District Court."

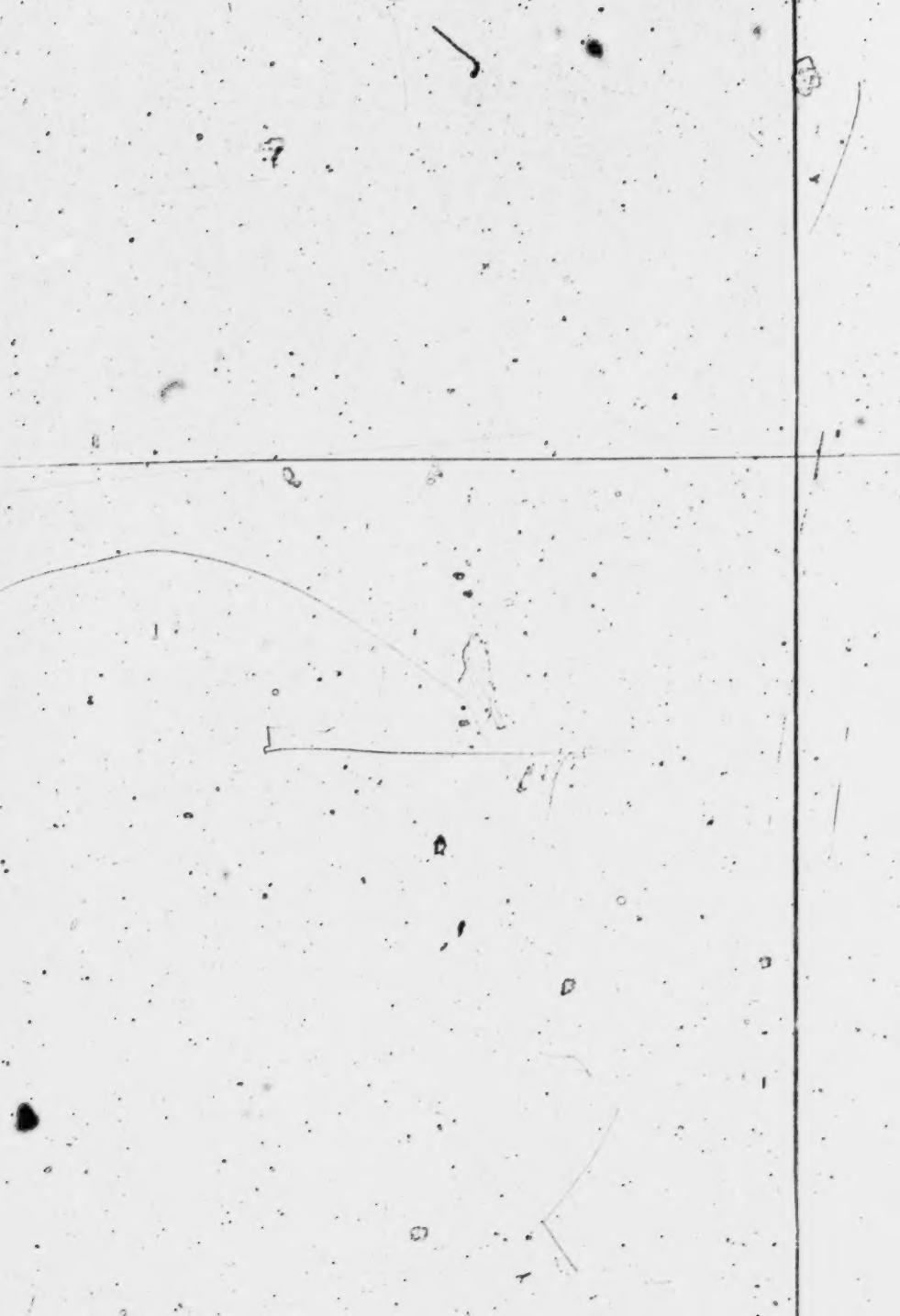
Conclusion.

The motion of the Appellee to dismiss the appeal or to affirm the judgment should be granted.

Respectfully submitted,

PHILL SILVER,

Appellee Pro Se.



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IN THE

Supreme Court of the United States

October Term, 1964
No. 935

FRANK M. JORDAN, as Secretary of State of California, EDMUND G. BROWN, as Governor of the State of California, THOMAS C. LYNCH, as Attorney General of the State of California, and THE SENATE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA,

Appellants,

vs.

PHILL SILVER,

Appellee.

BRIEF FOR APPELLANTS, OPPOSING MOTION TO DISMISS OR AFFIRM.

Preliminary Statement.

First: Appellee's motion to dismiss or affirm was filed 31 days after the time allowed by Rule 16(1).[1] A motion by appellants to strike it is pending. Nonetheless, in order not to be caught in a time problem ourselves we present this brief in opposition to the appellee's motion. By doing so we do not intend to waive the untimeliness of the motion to dismiss, or to abandon our motion to strike it. Jurisdiction as such is

[1]The Statement As To Jurisdiction was served on appellee on February 24, 1965. The Motion to Dismiss or Affirm was filed on April 26, 1965, whereas the last day for that purpose was March 26, 1965.

obviously conceded by appellee, as the motion to dismiss is made on the sole ground of the unsubstantiality of the question.

Second: This case is significantly different in at least two important respects from the legislative-apportionment cases that have preceded it here. Because of these differences the case is not one for summary disposition, but one needing full briefing and argument and plenary consideration.

The case is different in the first place because, in one of its aspects, it brings up for review not merely an existing plan of apportionment but also a judicial mandate to the Legislature of the State of California ordering it to reapportion its Senate on a basis of districts of equal population. The order does not, however, chart a course around or through the various restrictive provisions of the State constitution which must inevitably affect the kind of redistricting that may be accomplished, even though that districting may comply with the order below.

The Legislature has not been told whether, in order to comply with the order, it may devise a Senate of more than forty members; or unite part of a county with another; or divide a county into more than one Senatorial district; or group counties of small population in a district having more than three counties; or make up a district out of non-contiguous territory. None of these districting devices is open under the State Constitution, which expressly prohibits them all. [*Cal. Const.*, art. IV, sec. 6; *Statement as to Jurisdiction*, Appendix "C", pp. 25-26.] Whether any of the prohibitory provisions is unconstitutional under the Equal Protection Clause is, of course, a Federal question [*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547]; but whether any of them is valid under the State constitution and severable from the others, is a State question. [*White*

v. Anderson, ____ Colo. ____, 394 P. 2d 333, 335, 337; *Morey v. Doud*, 354 U.S. 457, 470 (n.16); *Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562; *Dorchy v. Kansas*, 264 U.S. 286, 289-290.]

Except for *Forty-Fourth General Assembly of the State of Colorado v. Lucas*, 379 U.S. 693, in which there was a similar factual situation and in which this Court, deferring to the State court's determination of the State constitutional question [*White v. Anderson, supra*, 394 P. 2d 333], ordered reconsideration of a Federal apportionment decree in the light of the State decision, every case that has been here has been one in which the question presented was only the validity of a specific plan of apportionment upon which the lower court had passed. Whether in such a case, the plan conforms to the basic requirements of *Baker v. Carr*, 369 U.S. 186, and *Reynolds v. Sims*, 377 U.S. 533, is a question that may well adapt itself to summary disposition, as nothing new in the way of legal principles or analysis of differentiating facts is presented.

That is not the situation in the instant cause. Here we are concerned with a prospective plan—one yet to be framed but which must be framed to accord not alone with the Federal constitution but as well with the constitutional and severable provisions of the State constitution. Whether in that process the State courts should be given an adequate opportunity to speak on the State constitutional issues is not only a substantial but a grave question. A decent regard for the Federal-State relationship must give one considerable pause before cutting out of a State constitution provisions that are severable from those upon which the Federal axe has fallen, and which provisions the people of the State, acting directly in their own right, have deliberately selected. [See, *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176.]

So, too, if, for reasons of time or other expediency, the State courts are to be by-passed, it is a substantial question whether the Federal court that has the matter in hand may or should decide the State questions in order that there may be some sort of a blueprint for the construction job that has been imposed on the State legislature. If that court is to decide the questions, it should be told that, for at bar it has not done so.

The case here is also different from its predecessors, because of the facts that bear upon the history of and the reasons for California's present legislative structure. These facts are different in nature and extent from those involved in other cases. Not only is the whole problem of legislative reapportionment one for case-by-case consideration [*Reynolds v. Sims, supra,* 377 U.S. at 578], but so too is the question whether any given classification is a justifiable one under the Equal Protection Clause. [*Cf., Tigner v. Texas,* 310 U.S. 141, 145-147, 149; *Williamson v. Lee Optical,* 348 U.S. 483, 489.] While general principles may be the same in each case, the facts claimed to justify the classification are different. Precedents, therefore, are not necessarily factually apposite to the new facts.

It is the Equal Protection Clause, of course, and the judicial standards under it that must govern decision when a legislative apportionment is challenged as discriminatory. [*Baker v. Carr, supra,* 369 U.S. at 226.] Classification is essentially a factual question. The facts that bear on California's legislative system are complex and extensive. More than summary consideration is needed to assimilate and appreciate them.

Supplement to Statement of the Case.

Appellee takes no exception to the Statement of the Case presented in the Statement as to Jurisdiction. It may, therefore, be accepted as correct. It now needs some slight supplementation because of developments since it was prepared, and of the nature of appellee's argument.

1. On April 21, 1965, an action seeking a declaratory judgment to determine which, if any, of the provisions of the California Constitution may be ignored by the State Legislature in reapportioning the Senate in attempted compliance with the order here under appeal, has been commenced and is now pending in the Superior Court of the State of California for the County of Sacramento. The appellee, individually and as the representative of the class he claims to represent in the instant cause, is the defendant in that action. Among the plaintiffs is appellant here, The Senate of the Legislature of the State of California. It is the intention of the Senate to prosecute that action diligently and expeditiously to final judgment in the highest court of the State to which it may be taken.

There is now pending in this Court a motion made by appellant Senate to take judicial notice of the official records of that State-court action. Appellee argues the merits of the question that is raised by the pendency of the litigation. [*Motion To Dismiss*, pp. 19-20.] He does not, however, deny the power of the Court to take that notice or the propriety of taking it. Indeed, appellee implicity concedes that notice should be taken, as his argument is premised on the facts that we seek to have noticed as well as others relating to the action.

2. While the state action just described was not then pending, the court below in the instant cause was requested generally to "abstain from exercising any

jurisdiction herein until after the State, acting through its appropriate departments of government has had a reasonable time and opportunity to do whatever may be necessary to bring itself into conformity with applicable federal law relating to legislative apportionment . . ." [*Answer in Intervention of the Senate of the Legislature of the State of California*, p. 12. See also, *Rep. Tr. of Proceedings*, Sept. 2, 1964, p. 75, lines 1-17.]

3. Appellee's request for relief and the showing made below in support of his position consisted, for all practical purposes, of nothing more than the numbers of people in each Senatorial district according to the 1960 Census of Population. [See, *Rep. Tr. of Proceedings*, Sept. 2, 1964, p. 14, line 23, to p. 17, line 14; *Complaint*, p. 9, line 14, to p. 15, line 10; *Stipulated Statement of Facts*, pp. 1, 2.]

4. There is pending in the California Senate a bill, Senate Bill 6, which, if adopted will reapportion the Senate on a population basis. In the course of attempting to effect such reapportionment, however, serious questions whether the bill violates the provisions of section 6 of Article IV of the California Constitution in several respects arise.[2] The pendency and tenor of the bill may be judicially noticed as a public act of the legislative department of the State. [*Cal. Code of Civil Procedure*, sec. 1875(3) and see, *Alaska v. American Can Co.*, 358 U.S. 224, 226-227.]

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[2]Counties of small population are placed in a district having more than three counties; some counties are given more than one senator each; some counties are divided into more than one senatorial district. The California Constitution, Article IV, section 6, prohibits such districting devices. It also requires that the Senate consist of forty members, elected from forty districts. Before there can be any assurance that Senate Bill 6, or any other plan of apportionment, is valid the validity and effect of the plan under these provisions of the State constitution must be authoritatively decided.

ARGUMENT.

I.

Whether on the Facts There Is a Rational Basis for California's Classification Is a Substantial Question Not Answerable Summarily.

No doubt the question of legislative malapportionment, whatever it may once have been, is now a justiciable one. *Baker v. Carr*, 369 U.S. 186 saw to that. But in making the question justiciable, this Court also made it pretty clear that the criteria of decision would be the "well developed and familiar" judicial standards under the Equal Protection Clause. [369 U.S. at 226.] Differential classification based upon rational and relevant differences between classes is one of those standards. [*McGowan v. Maryland*, 366 U.S. 420, 425-426; *Allied Stores v. Bowers*, 358 U.S. 522, 527.] The question whether there is a rational basis for a classification that is under attack is necessarily dependent upon the facts peculiar to the individual case. It cannot ordinarily be properly disposed of by formula or by a doctrinaire or inflexible adherence to *stare decisis*. Grounds of differentiation in California, are not the same or necessarily as ineffective as those that were urged in Tennessee's or Georgia's cases.

In assailing the classification reflected by the California Constitution, appellee relied only on population numbers and an inflexible application of the formula "one man, one vote." Yet, in announcing, and since applying that formula this Court has indicated that some leeway may exist so that numerical equality need be only approximate and that appropriate consideration may be given to factors other than a head count. [See, *e.g., Forston v. Dorsey*, 379 U.S. 433, 436; *Reynolds v. Sims*, 377 U.S. 533, 577-579.]

In opposition to appellee's arithmetical showing appellants countered with a comprehensive presentation and analysis of demographic, geographic and economic data that demonstrated such differences between sections of the state and the interests and necessities of the people residing in them as to supply a rational basis for the classification under attack. [See, *Intervener's Memorandum re Judicial Notice, passim.*] It is evidence of the substantiality of the question that the court below was of the opinion that this showing, but for *Baker v. Carr, supra,* "would have been highly persuasive . . ." [*Statement As To Jurisdiction,* Appendix "A", p. 16.] It is not, therefore, an unsubstantial question, whether the specific facts making up that "highly persuasive" showing do differentiate California's case from Tennessee's or Georgia's sufficiently to enable the "well developed and familiar" judicial standard of classification to operate. The facts are extensive and complex. Plenary, not summary, consideration is needed to assimilate them and appreciate their significance.

II

California's Case Is Different, Because There Is an Effective Political Remedy, by Use of Which the People Have Made a Definitive Choice.

The question whether the people of a State, having an opportunity to make a clear cut choice, may select the kind of representative assembly they desire, is not one that is disposed of by a mere citation to *Lucas v. Colorado General Assembly,* 377 U.S. 713. The rejection in that case of the selection made by the people of Colorado was surely influenced by the fact that each plan proposed to the electorate had debatable or unpopular features so that, as this court said, "neither of the proposed plans was, in all probability, wholly acceptable

to all voters in the populous counties; and the assumption . . . that the Colorado voters made a definitive choice between two contrasting alternatives and indicated that 'minority process in the Senate is what they want' does not appear to be factually justifiable." [377 U.S. at 731.]

In California, however, the voters did made a "definitive choice." The two plans put to them in 1926 were identical, except for the composition of the Senate. By the same token, it is always possible in California for the majority against whom the present apportionment is said to discriminate, to eliminate the asserted basis in the State constitution of that discrimination in the same way it was adopted—by direct legislative action at the polls. It is a fact of significance in this regard that four attempts to make that change have failed to command a popular majority. These facts substantially differentiate California's situation from Colorado's and from those of the States in which no effective political remedy for malapportionment is available. The question whether they are enough to require a different litigative result is just as substantial.

III

There Is a Substantial Question Presented Whether the State Courts Should Be Given an Opportunity to Speak on the Questions of State Law Necessarily Involved in Any Re-Apportionment.

First: Not the slightest suggestion has been made by u that a provision of a State constitution cannot be held nconstitutional under the Federal constitution. [See, *Motion to Dismiss*, pp. 13-15.] What we did and do sug est, however, is that while the California legislature s been ordered by the judiciary to re-apportion, it has not been told whether and to what extent it may disregard the provisions of its own constitution

in complying with that order. [*Juris. Statement*, pp. 19-21.] No doubt, to the extent that such provisions prevent an apportionment that meets, or compels one that violates, Federal constitutional requirements, they are unconstitutiinal. But which of California's provisions are in this category? And, whichever ones they may be, are they severable from the others? The order of the court below neither answers these questions nor provides standards from which the answer may be derived.

If only some of those provisions fall as the consequence of the Federal constitution, and those are severable, the remaining ones obviously must be observed by the State legislature. That was precisely the situation in Colorado—the situation that impelled this Court, notwithstanding its affirmance of a decree holding Colorado's plan federally constitutional, to vacate that decree and remand the cause for further consideration of the parts of it that dealt with validity under the State Constitution, in the light of the supervening decision of the State Supreme Court in *White v. Anderson, supra*, 394 P. 2d 333. [*Forty-Fourth General Assembly of the State of Colorado v. Lucas*, 379 U.S. 693.] California is now in the same situation, for the jurisdiction of the State courts has been invoked to determine what is left of the State constitution's provisions respecting the composition of the Senate. Obviously, in view of the result in second *Lucas*, that is, at least in the first instance, a question for the State courts. Also, *Morey v. Doud, supra*, 354 U.S. at 470 (n. 16); *Wolff v. Court of Industrial Relations, supra*, 267 U.S. at 562; *Dorchy v. Kansas, supra*, 264 U.S. at 289-290.]

It may be that when that answer is vouchsafed the plan now being considered in the legislature, Senate Bill 6, will be seen to be valid under the State constitution, thus leaving for the Federal courts only the question

of its validity under the Federal constitution. Or it may be found obnoxious to the State constitution, thus requiring a new one to comply with it and the order of the court below. Either way, the path to a plan that will meet both the order below and the State constitution will be clear. Whether this Court's latest action in respect of Colorado is a sufficiently close precedent to entitle California to the same kind of reconsideration is a substantial question.

No doubt, as appellee says [*Motion to Dismiss*, p. 16], the constitutional provisions of Colorado and California are not identical. They are the same, however, in prohibiting division of a county; and there are other provisions that a Legislature reapportioning the California Senate must consider as well. Perhaps, it is California's additional requirement that there be only one senator to a county which results in the malapportionment interdicted below. If so, it must fall. That fall does not necessarily bring down with it all else in the State constitution bearing on the composition of the Senate.

The court below did not hold that any specific provision of the State constitution was bad. It dealt only with the existing apportionment in fact, not with its causes. Whatever that cause in the State constitution may be, the possibility or even the probability that it is severable from the other provisions exists and cannot be ignored. The situation, then, becomes exactly like Colorado's. In view of this Court's action in *Forty-Fourth Assembly v. Lucas, supra*, it is a substantial and fairly debatable question whether the California legislature should be compelled to reapportion itself without being told by the State courts what it may and may not do in respect of disregard of the State constitution.

No doubt this Court has acted summarily in a number of legislative apportionment cases. [See *Motion to Dismiss*, pp. 17-18.] In some of them, *e.g.*, *Scholle v.*

Hare, 369 U.S. 429, the lower court had acted before *Baker v. Carr, supra*, had been decided. Remand was ordered to permit the effect of *Baker* to be considered. In each of the cases, whether decided below before or after Baker, a specific plan was before the Court. The guidelines deducible from *Baker* and *Reynolds* were sufficient for decisional purposes in respect of those plans. No questions of State law or of factual differentiation from the earlier cases, or of providing guidelines for prospective legislation that had to comply with State constitutional standards too, were involved. The instant case does not present such a readily identifiable pattern. The guidelines are yet to be set; and it is the right of the State courts to express and have considered their views on the questions of State constitutional law that have arisen.

Second: The purpose of having judicial notice taken of the pending action in the State courts, is to show that efforts are being made in the proper quarters to get the guidelines that are needed to create a California legislature that will meet controlling State standards as well as those of the Federal constitution. Accordingly, the way is open to permit the State questions to be settled in the forum in which they should be settled. Once settled there, the Federal judiciary is bound by the result. The effect of such a settlement upon the kind of a legislature that may or will be created and, therefore, upon the question of conformity to the Federal constitution, is obvious.

This is not an intentional delaying action. Sooner, or later, whatever legislative system may eventuate in

California will have to be tested against the valid provisions of the California constitution, preferably by the State Courts, necessarily mayhap by the Federal courts. Whether that system turns out to be the one now embodied in Senate Bill 6, or some other plan devised by the Legislature, or one devised by the court below, test of it under the State constitution will ultimately have to be made. A Federal court, using its powers to reapportion a State legislature, cannot and should not, even if it could, ignore valid State law any more than in a case involving the validity of a private contract made in the State. To permit the questions of State law now pending in the State court with respect to the validity and severability of the provisions of the State constitution relating to legislative apportionment, to be decided before the Federal judiciary acts finally, will in the long run save rather than lose time and it will preserve the balance of power between State and Nation.

Third: It is neither necessary nor fitting to attempt now and on appellee's motion to dismiss, to prejudge the outcome, procedurally or on the merits, of the State litigation. Appellee seems to believe the State courts will decline jurisdiction. [See, *Motion to Dismiss,* pp. 19-20.] No reason is shown why they should do so, now that they have the example of the Colorado litigation to follow. Furthermore, the Supreme Court of the State has already pointed out that an action for a declaratory judgment, like the one now pending, is a proper means of obtaining determination of the validity of the State constitutional and statutory provisions relating to ap-

portionment.[3] [*Yorty v. Anderson*, 60 Cal. 2d 312, 317, 33 Cal. Rptr., 97, 100, 384 P. 2d 417, 420.] The question whether the State courts will take jurisdiction may, and indeed will be quickly settled, as proceedings to that end, set to be heard May 14, 1965, have already been started by appellee in the form of a motion to dismiss on the ground of comity and prior pendency of the Federal litigation.[4]

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[3]The cases cited by appellee are clearly different. In *State v. Meier*, (N.D.), 127 N.W. 2d 665, the State Court, as a matter of comity declined to hear the precise question of validity under the *Federal* constitution that the parties petitioning the State court to act had voluntarily submitted to a Federal court. These parties came to the State court, reserving their right to get a final decision from the Federal court, because the latter court had abstained in order to give the State court an opportunity to pass on the questions. The State court, however, while declining to decide the Federal questions, did act to decide questions that had been raised under the State constitution. That is exactly and all that the California courts have been asked to do in the pending litigation.

In *Pacific Electric Ry. Co. v. Dewey*, 95 Cal. App. 2d 69, 212 P. 2d 255, cited by appellee, a court's discretionary declination of jurisdiction in a declaratory relief suit was upheld because the suit was being used as a means of escaping a jury trial in a pending action at law between the same parties in which the identical issues were involved. At bar, the State issues are different issues from those at stake in the Federal litigation. The State case is concerned, as was the Colorado court in *White v. Anderson*, *supra*, 394 P. 2d 333, with questions under the State constitution, the Federal court with questions under the Federal constitution.

[4]This is another of the facts appearing in the records of the State court and, thereiore, a proper subject of judicial notice, for the reason noted in our Motion To Take Judicial Notice, p. 3, lines 18-32.

CONCLUSION.

The Motion To Dismiss Or Affirm, if not stricken, should be denied and probable jurisdiction noted.

Respectfully submitted,

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